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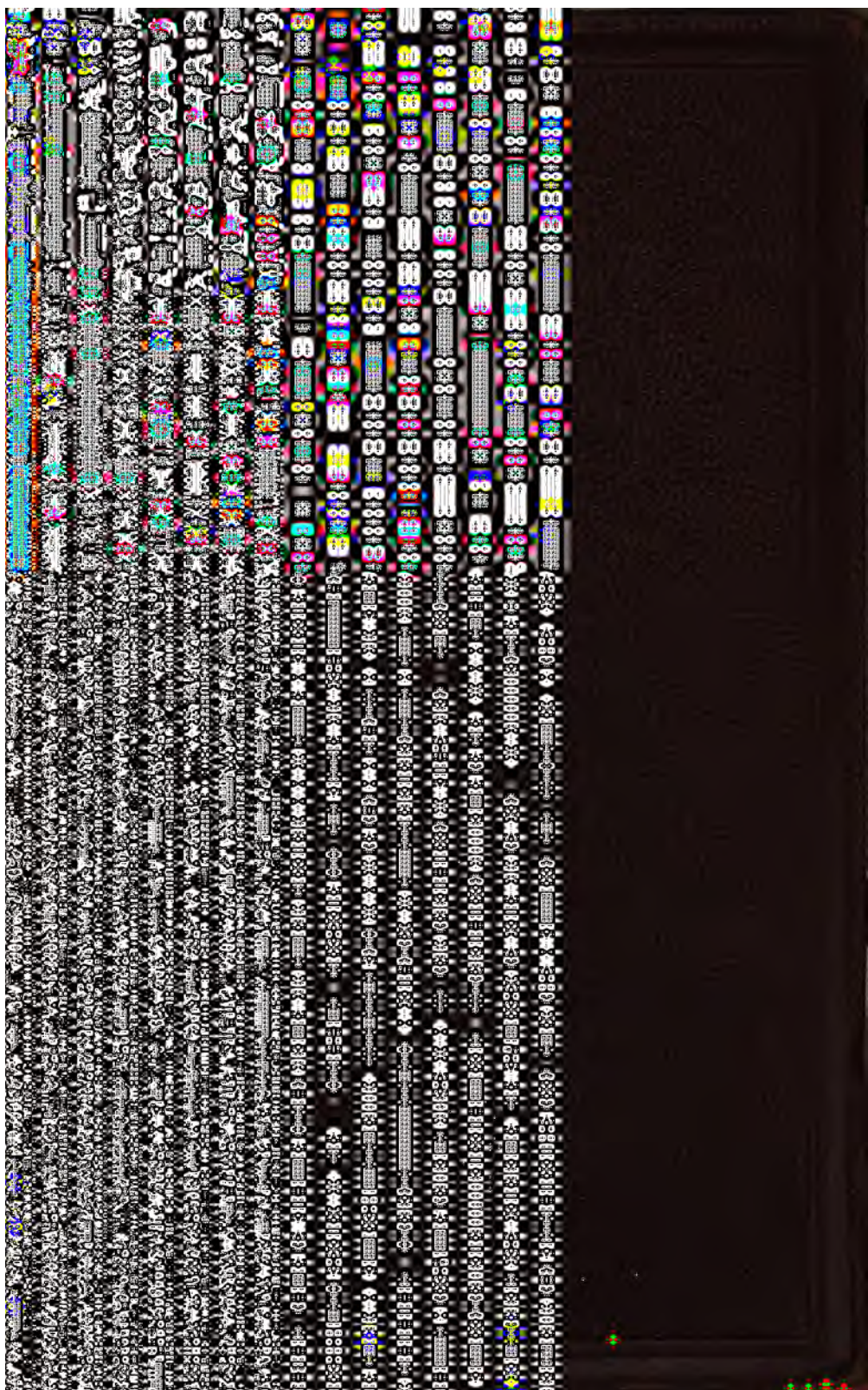
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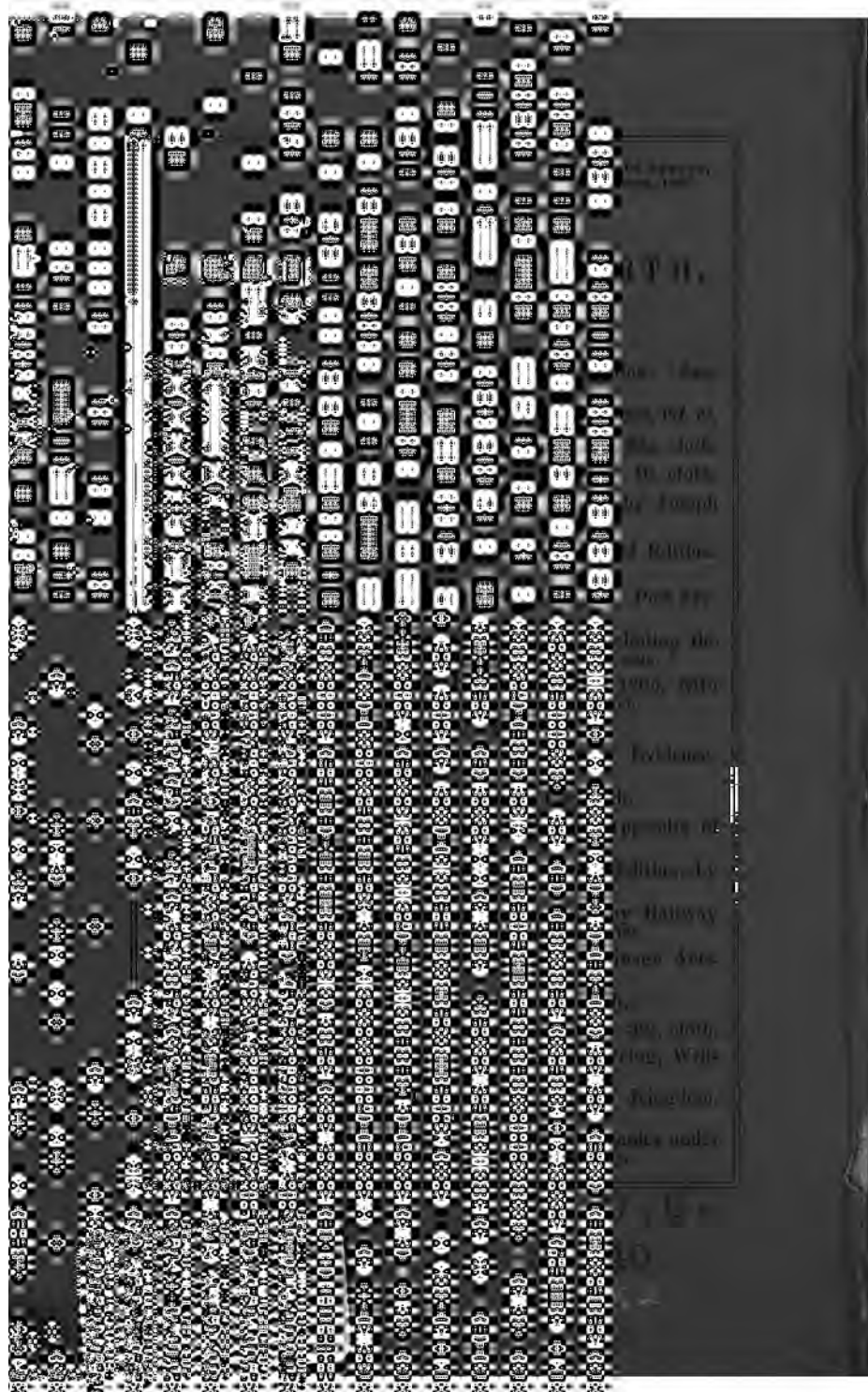
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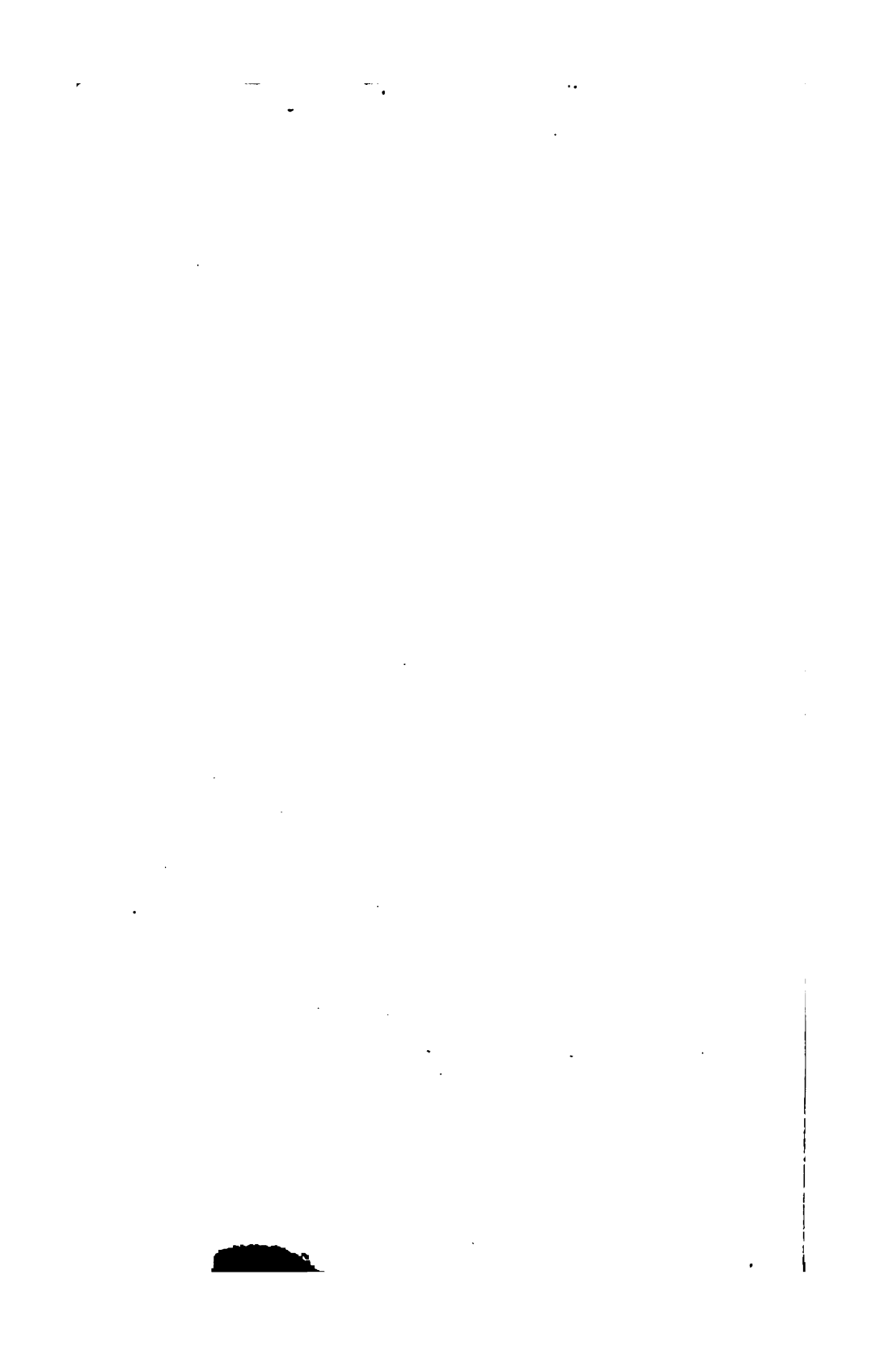












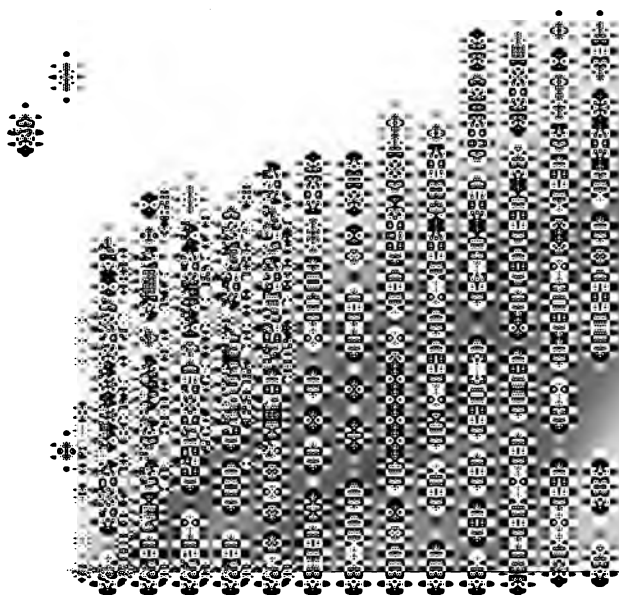
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A TREATISE  
ON THE  
LAW OF WINDOW LIGHTS.

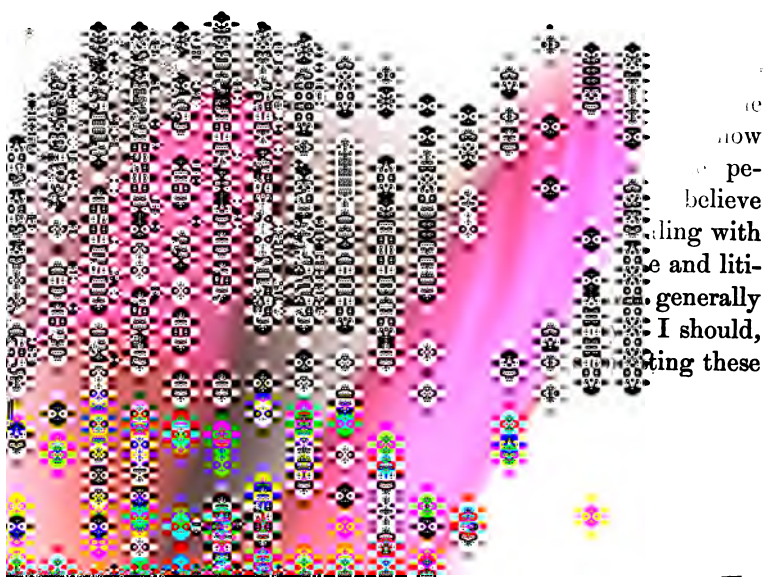
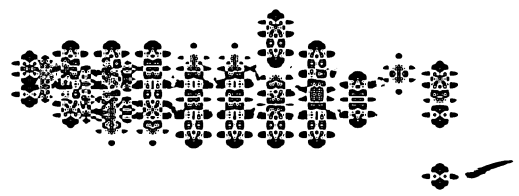
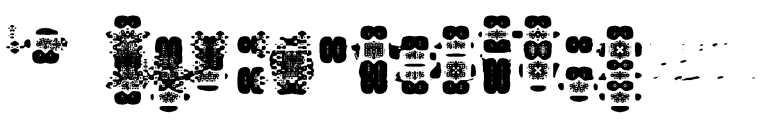
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## P R E F A C E.

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THE great increase in the last few years of cases upon the Law of Window Lights, and the large and growing proportion of those cases which is brought before courts of equity, are, I trust, a sufficient excuse for a new and further treatise on the subject, written from the point of view of the equity practitioner.

Perhaps a word of introduction is necessary with regard to the Appendix of Conveyancing Forms. Those who are conversant with this subject know that there are hardly any precedents of assurances by which the right to window lights may be granted or released. The explanation of this is most probably to be found in the small commercial value of this privilege till within a very short time. But since the demand for new and enlarged buildings within the confined areas of our great towns, and especially within the limits of the city of London, has caused a great increase of the height of buildings, the right to window lights has now in many instances become of very considerable pecuniary value. And in this state of things, I believe that the absence of forms of assurance for dealing with the right has been the cause of much expense and litigation, as the price of the privilege has been generally settled by resort to a court of law or equity. I should, however, have felt much diffidence in submitting these



precedents to the profession, had they not been subjected to the revision of one of our most accurate conveyancers.

I have only to add my grateful acknowledgments to those friends to whose assistance I have been indebted in the composition of this treatise—to Mr. T. C. Wright, for his help in the preparation of the Appendix of Conveyancing Forms; to Mr. H. F. Bristowe, for access to the shorthand notes of several cases not then in print, one of the most important of which never has been reported; and to a friend on the South Wales circuit for the materials of the section as to the remedy by action at law. No one can have studied any subject connected with the law of easements without being under great obligations to Mr. Gale and the editors of his admirable work; but I have not hesitated to express my dissent from some few of his conclusions, which seem to me at variance with the principles of our law or with more recent decisions of our courts.

5, OLD SQUARE, LINCOLN'S INN,  
*January, 1867.*

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# THE LAW OF WINDOW LIGHTS.

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## CHAPTER I.

### OF THE NATURE OF THE RIGHT TO WINDOW LIGHTS.

THE right to window lights is commonly described as the right to the unobstructed lateral transmission of light and air over the land of an adjoining owner. But while this definition gives an account sufficient for ordinary purposes of the character of the enjoyment, it affords no explanation of the legal character of the right.

Light and air are in the English, as in the Roman, law *res communes*, things in which no permanent property can be acquired (*a*). Every one may use and

(*a*) *Liggins v. Inge*, 7 Bing. 682. "However, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but a usufructuary property is capable of being had; and, therefore, they still belong to the first occupant during the time he holds possession of them and no longer. Such, among others, are the elements of light, air and water."—Steph. Black. 4th edit. vol. I. p. 160.

"Communia omnium sunt naturali jure aër, aqua profluens, mare, et

enjoy them whenever he has the opportunity so to do, no one can acquire a future property in them. The right then cannot consist in a title to the possession of the light and air which in all future time will pass over a given space. But it must consist in some obligation, in some manner imposed on the owner of that space, to refrain from so using it as to interfere with the light and air which will pass over it to the tenement to which the right is annexed. Of this obligation we shall be able to form a clearer notion by a short examination of the respective rights of the owners of two adjoining pieces of land, previous to the acquisition of any right by the one and the imposition of any obligation on the other.

Every owner of land, with a few unimportant exceptions, is owner also of all the space superincumbent upon that land. "*Cujus est solum, ejus est usque ad cælum*" (b), is a maxim of the English law. And an interference with the space superincumbent on a man's land is an injury for which the law gives a remedy (c). Every man may deal with his land and the space above it in such manner as he thinks fit, so that he do no injury to his neighbour or to the public. He may erect on his land a house with as many windows as he pleases; and he may build this house on the very extremity of his land, close to the land of his neighbour. By so

per hoc littora maris, quæ omnia in nostro dominio esse, ne natura quidem patitur, quandoquidem iis omnes utuntur."—Warnkœnig, *Institutiones Juris Romani Privati*, 1834, *sec.* 270.

(b) Co. Litt. 4a. The exceptions are persons who own one story of a house—a not uncommon tenure of chambers in the Inns of Court.

(c) *Baten's case*, 9 Rep. 53b, 54a, and cases there cited; *Norris v. Baker*, 1 Rolle's Rep. 393; *Pickering v. Rudd*, 4 Camp. 219; *Fay v. Prentice*, 1 C. B. 828.

doing he confers no new right, and inflicts no injury on his neighbour (*d*). It is true that the windows of this building may command a view of his neighbour's gardens or pleasure grounds, or even of the interior of his house, may so invade his privacy, and consequently lessen the value of his property. But this is not considered by the law as a wrong for which any remedy is given.

"The Court," said Turner, L. J., "has nothing to do with the diminution of the value of a house caused by its windows being overlooked, and its comparative privacy destroyed" (*e*).

In *Chandler v. Thompson* (*f*), Le Blanc, J., said, "that though an action for opening a window for obstructing a man's privacy was to be found in the books, he had never known such an action maintained, and he had heard Eyre, C. J., say that such an action did not lie, and that the only remedy was to build on the adjoining land opposite the offensive window." And the observations of Blackburn, J., and Lord Westbury, C., in the recent case of *Jones v. Tapling*, are decisive on the point. The former said, "It is quite true that the opening of a new window looking into the grounds of another may not only annoy that neighbour, but may often affect the value of his property. But the law of England considers that no injury" (*g*).

(*d*) *Moore v. Rawson*, 3 B. & C. 332, per Littledale, J.; *Jones v. Tapling*, 12 C. B., N. S. 826; 31 Law J. Rep. N. S., C. B. 342, per Bramwell, B.

(*e*) *Johnson v. Wyatt*, 2 De G. J. & S. 18; 33 Law J. Rep. N. S., Ch. 394.

(*f*) 3 Camp. 82.

(*g*) 12 C. B., N. S. 842; 31 Law J. Rep. N. S., C. B. 354.

The latter said, " There is another form of words which is often found in the cases on this subject, namely, the phrase, 'invasion of privacy by opening windows.' That is not treated by the law as a wrong for which any remedy is given" (*h*). It follows that the builder of the house in question, however close it may be to his neighbour's land, however numerous its windows, is entitled to enjoy whatever light and air he can receive through its windows, and no one can complain of him for so doing (*i*).

But the owner of the land adjoining to that on which the house has been built can deal with his plot also as he thinks fit. He, too, can build a house or put up a wall or screen, and this on the margin of his own property, close to the newly built house and newly opened windows. By so doing he may impede, or totally prevent, the access of light and air to his neighbour's premises; but this is no more an injury in the eye of the law than was the intrusion upon his privacy (*j*).

(*h*) 11 H. L. Ca. 305 ; 34 Law J. Rep. N. S., C. B. 345. There are expressions to the contrary in *Cherrington v. Abney*, 2 Vern. 645 ; but they are unsupported by any other authority.

(*i*) The French law is very different on this point. It forbids the owner of land to open windows (*vues*) overlooking his neighbour's premises, except he leave an interval of his own land to the extent of at least six feet if the window look directly, and two feet if it look laterally over the neighbour's ground. If the interval be less, only such openings (*jours*) are allowed as are at a height above the floor of the room to which they admit light and air sufficient to prevent any outward view. The provisions of the code in this behalf are exceedingly intricate and curious ; *Pardessus, Traité des Servitudes* (1838), vol. I. p. 454, &c. ; *Code Civil*, 675—680.

(*j*) *Jones v. Tapling*, 12 C. B., N. S. 847 ; 31 Law J. Rep. N. S., C. B. 346, per Bramwell, B.

It is plain from what has been said, that the builder of a house, if the site be so confined that the land of his neighbours adjoins the walls of his house on every side, cannot be certain of receiving an unobstructed supply of light and air in any other than a vertical direction. The uses to which his neighbours may put the portions of their land which abut upon his house may deprive the windows of his house of the lateral access of all light and air, and he is absolutely without remedy.

It is, however, possible for it to become an unlawful act for the owner of land adjoining to a building to use it in such a way as to prevent the enjoyment of light and air by the dwellers in that building. In what ways he may lose, in this respect, his natural rights over his own property will form the subject of the second, and to what extent he will be restrained in the exercise of such rights the subject of the third chapter; at present the object of attention is the character of the restraint imposed on him. He has lost nothing which he has actually enjoyed up to this time, but he has become limited to a certain extent, in the eye of the law definable, in his power of using his land as he may think fit. He is limited in the exercise of this power precisely in the same manner and to the same extent (whatever that extent may be) as if he had covenanted with the owner of the building that he would do nothing whereby the access of light and air to the building would be impeded. It cannot be said that he has granted away anything of his, light and air are not the subjects of actual grant, but the law now implies a covenant by him not to interrupt the free access to the adjoining

tenement of such an amount of light and air as the law considers necessary to the enjoyment thereof (*k*).

But there is one very important difference between the effect of this covenant implied by the law, and that of a covenant made with the owner of a house by the owner of the land adjoining thereto. In either case the benefit of such a covenant would, on an assignment of the house, pass to the assignee. But it is a rule of English law that covenants entered into by owners of land will not pass with the land so as to bind the assignees of the covenantor, except in cases where the covenant is between landlord and tenant. The burthen of a covenant does not run with the land (*l*). Courts of equity may consider it binding on assignees who take the land with notice of the existence of the covenant (*m*); but even they will not enforce it upon one who has purchased the land without notice of the covenant, express or implied. But the burthen of this covenant, which the law implies, runs with the land: the benefit of it will attach to the house whoever may be its possessor, the burthen of it will attach to the land to whomsoever it may pass.

This right to window lights, this right to the benefit of a covenant by the owner for the time being of the adjoining land that he will not obstruct the access of light and air to the adjoining house, is one of that class of rights known to the English law as easements. An easement is defined (*n*) as "a privilege without

(*k*) *Moore v. Rawson*, 3 B. & C. 340, per Littledale, J.

(*l*) *Spencer's case*, 5 Rep. 16, 1 Smith's Leading Cases, 43.

(*m*) *Tulk v. Moxhay*, 11 Beav. 571; 2 Phil. 774.

(*n*) Gale on Easements, 3rd edit. p. 5.

profit (o) which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not to do something on his own land, for the benefit of the dominant owner" (p). There must be two distinct tenements—the dominant, to which the right belongs, and the servient, on which the obligation is imposed—to constitute an easement, as the English law calls it having regard to the advantage of the dominant, a servitude, as the Roman and French law call it having regard to the burthen of the servient tenement (q).

The principal division of easements is that into affirmative and negative. Affirmative oblige the owner of the servient tenement to suffer the commission of acts injurious to him; negative restrain him in some respect from the exercise of the natural rights of property. The right to window lights is evidently one of the latter class.

A convenient division of servitudes in the French Code, often borrowed by our jurists in discussing the subject of easements, is that into continuous and discontinuous servitudes.

Continuous servitudes are those of which the enjoyment is or may be perpetual without the necessity of any actual interference by man, as a watercourse, or right to light and air.

Discontinuous servitudes are those the enjoyment of

(o) *I. e.* a "profit à prendre," a participation in the profits of the neighbouring soil.

(p) *Termes de la Ley.* Title, "Easements."

(q) Servitude, however, is a wider term, including profits à prendre.



which can be only had by the interference of man, as rights of way, or a right to draw water (*r*).

The right to window lights is, as stated in the text of the Code, a continuous easement.

An easement is an incorporeal right; and Lord Coke lays down "that a thing incorporeal cannot be appurtenant or appendant to another thing incorporeal" (*s*), so that an easement can only be claimed as accessory to a corporeal hereditament. This, however, is doubted by Mr. Hargrave (*t*), and by the editor of "Gale on Easements" (*u*), who consider that the true test of what things can be appurtenant to what is the propriety of the relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity. However this may be, it is certain that this particular easement of the right to window lights can only be claimed as accessory to a tenement. With that tenement the easement is transferred; and when that tenement is permanently destroyed, the easement ceases to exist.

In order to gain a complete notion of the character of this right or easement, it will be well to distinguish from it certain privileges, enjoyed by means of the

(*r*) Les servitudes sont ou continues, ou discontinues. Les servitudes continues sont celles dont l'usage est, ou peut être continu, sans avoir besoin du fait actuel de l'homme. Les servitudes discontinues sont celles qui ont besoin du fait actuel de l'homme pour être exercées. —Code Civil, 688.

(*s*) Co. Litt. 121b.

(*t*) Note 7 to Co. Litt. 121b.

(*u*) Gale on Easements, 3rd edit. 9. Mr. Gale himself appears to have been of Lord Coke's opinion.

same openings by which light and air are received. The first of these is prospect, the view of external objects. Prospect is a servitude acknowledged by the Roman law (*v*); but the English law has never acknowledged prospect as a right capable of being annexed to a tenement as an easement. Its enjoyment can only be secured by express covenant; and the burthen of this, as before stated, will not run with the servient tenement.

In *Aldred's Case* (*w*) Wray, C. J., said, "That for prospect which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great recommendation of a house if it has a long and large prospect."

In another early case Twisden, J., said, "Why may I not build up a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light." And the judgment of the Common Pleas to the contrary was reversed (*x*).

Lord Hardwicke, when the help of the Court of Chancery was sought to prevent the defendants from obstructing the plaintiff's prospect, said, "You come in a very special and particular case on a particular right to a prospect. I know no general rule of common law which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the

(*v*) Inter hanc (servitutem luminum) et servitutem prospectûs, hoc interest, quod in prospectu plus quis habet, ne quid ei officiat ad gratiorem prospectum et in liberum; in luminibus autem non officere, ne lumina cujusquam obscuriora fiant. — Warnkœnig, Institutiones Juris Romani Privati, 1834, sec. 413.

(*w*) 9 Rep. 57b.

(*x*) *Knowles v. Richardson*, 1 Mod. 55; 2 Keb. 642.

case, there could be no great towns ; and I must grant injunctions to all the new buildings in this town " (y). And in another case the same eminent judge remarked, " It is true that the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason for hindering a man from building on his own ground " (z).

Lastly may be cited the words of Lord Cottenham, " It is not, as is said in one case, because the value of the property may be lessened ; and it is not, as is said in another, because a pleasant prospect may be shut out, that the court is to interfere ; it must be an injury very different in its nature and its origin to justify such an interference " (a).

These authorities show clearly that it is not possible for such an easement as a right to prospect to exist ; and that no such obligation can attach to a tenement as to prevent its owner so using his own land as to obstruct the prospect from another tenement. Any such obligation must be founded in personal contract. Injury may doubtless be done to a tenement by interfering with the view therefrom ; but it is *injuria absque damno*, an injury for which the law affords no remedy.

Secondly, it has occasionally been attempted to establish a right which would be the converse to a right to prospect, that of having the view from outside of objects within a window secured from interruption. In the case of *Smith v. Owen* (b), it was argued by counsel,

(y) *Attorney-General v. Doughty*, 2 Ves. sen. 45.

(z) *Fishmongers' Company v. East India Company*, 1 Dick. 163.

(a) *Squire v. Campbell*, 1 Myl. & C. 486.

(b) 35 Law J. Rep. N. S. Ch. 317.

that the plaintiffs were entitled to similar protection in respect to obstructions to the view of the public of the goods they exhibited as in respect to the obstruction of the access of light. But Wood, V.-C., said, "So far as a man standing outside the window would be prevented from getting a view of the goods there exhibited, the case would stand on the same footing as an obstruction to light; a person must not cause an injury in creating such an obstruction. If a shopkeeper wished to show his goods within the shop, he had a right to the free access of light for the purpose, and he apprehended it was the same if he wished to show the goods outside by means of a transparent medium. This, however, did not apply to the present case; all that could be complained of was, that persons could not see the goods so soon as they might if the alterations objected to had not been made. When they came in front of the shop, the goods would be seen just as well as before. So if a sign were hung up in front of the shop, such as a pawnbroker's balls, which could be seen from a long distance; there was nothing to prevent a neighbour building on his own ground in such a way as to obstruct the direct view of such a sign. The bill must be dismissed with costs."

And in a case before Kindersley, V.-C., in which it was argued that the erection of a new gasometer would shut out the view of the public from the plaintiff's premises, and that he would consequently be injured by losing chance customers; his Honor said, "As to the ground that the gasometer will prevent the view of persons in Ann's Place, it is impossible that that can be a ground for an injunction" (c).

(c) *Butt v. Imperial Gas-light and Coke Company*, 14 W. R. 508.

The result is, that the owner of a tenement possessing the right to window lights may use the windows for the exhibition of his wares; and that the owner of the servient tenement, being incompetent to obstruct the access of light and air to those windows, is not able to obstruct the view of the wares in the windows by passers-by; but that no right can be acquired to an unimpeded view from the outside of objects within apart from and in addition to the right to window lights.

Lastly, the acquired right to unimpeded transmission of air must not be confused with the right, which every man possesses at the common law, to receive the air which has access to his premises free from pollution; a right which can only be excluded by the acquisition of a countervailing easement by the party who creates the nuisance.

In an early case in which the defendant had built a pig-stye so near to the plaintiff's premises that the air he received was corrupted thereby, the court said, "The building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it (*d*). And the comparison is put of the corruption of a watercourse by dye works." And in *Bliss v. Hall* (*e*), Tindal, C. J., remarked, "The plaintiff came to his house clothed with all the rights appurtenant to it, one of which at the common law is a right to wholesome and untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time, that the law

(*d*) *Aldred's case*, 9 Rep. 57b.

(*e*) 4 Bing. N. C. 186.

will presume a grant from his neighbour in favour of the party who causes it" (*f*). This right is similar to the right to receive a flow of water free from pollution, a right which has of late been frequently protected by the aid of the Court of Chancery (*g*).

(*f*) For instances of what trades are nuisances at law, vide 1 Roll. Abr. 88, 89. Action on the case, N. pl. 6, 7; 2 Roll. Abr. 141. Nusans, G. pl. 13, 14, 15, 18; *Jones v. Powell*, Palmer, 537; Hutton, 135, and cases there cited. And as to the question what corruption of air amounts to a nuisance, vide *Walter v. Selfe*, 4 De G. & Sm. 815.

(*g*) *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161, L. R. 1 Ch. 349; 35 Law J. Rep. N. S., Ch. 88, 382; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; 35 Law J. Rep. N. S., Ch. 105.

## CHAPTER II.

### OF THE ORIGIN OF THE RIGHT.

THE right to window lights may be acquired in three ways, by occupancy, by express agreement, and by implied agreement.

This division is given in Lord Hardwicke's judgment in *The Fishmongers' Company v. The East India Company* (a), where he says, "If the house were built on the old foundation, it would entitle the plaintiffs to their lights as an ancient messuage; but if on the new foundation, then the party must show a new agreement, or something to import one." And it is again given by him in another judgment in which he says, "Whoever comes into this Court, on such a right, must found it either on defendant's building so as to stop ancient lights, for which he has prescription (notwithstanding that he must lay a particular prescription), or else on some agreement, either proved, or reasonable presumption thereof (b).

Each of these modes of acquisition will form the subject of a distinct section.

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### SECTION I.

#### *Of the Acquisition of the Right by Occupancy.*

It has been laid down in the preceding chapter, that light and air are things in which no permanent property

(a) 1 Dick. 163.

(b) *Morris v. Lessees of Lord Berkeley*, 2 Ves. sen. 452.

can be gained, but that every man who has the opportunity may make use of and enjoy them, and may occupy them so long as the opportunity continues. But from the earliest period of English law of which any record remains, such occupancy when continued without interruption for a certain time, (which time has differed much at different epochs,) has drawn with it a right to the continuance of the same enjoyment, and has imposed on the owner over whose land the access of light and air has been enjoyed the obligation of not making such a use of his land as to interfere with that enjoyment.

In the earliest ages of the English law, the right to window lights by occupancy was gained by prescription, by showing the enjoyment of the window lights since the beginning of legal memory.

In a case in the reign of Henry the Sixth, it was said by Markham, J.: "If I have a house by prescription upon my soil, and another erects a new house upon his own soil next adjoining, so near to my house that it stops the light of my house, this is a nuisance to my house; for the light is of great comfort and profit to me" (a). And to the same effect were the expressions of Whitlocke, C. J.: "Like to the case where a man hath a house and windows in it, and another stops the light, then he may have an action upon the case; but true it is, that he shall not only count for the loss of the air, but also he ought to prescribe that time out of mind light had entered by those windows" (b).

(a) 22 H. 6, 15; Vin. Abr. Nuisance, G. pl. 10.

(b) *Sury v. Pigot*, Poph. 166; Tudor's Leading Cases in Conveyancing, 127; et vide the declarations in the cases of *Bland v. Moseley*, cited 9 Rep. 58a, and *Hughes v. Keeme*, Yel. 215.



This time out of mind, time during which the memory of man had not run to the contrary, was ultimately settled to begin with the commencement of the reign of Richard the First, A.D. 1189(c). It was so settled with the object of quieting possession, by excluding proof of a different state of things at an earlier date.

But as time went by, and the distance from that fixed epoch increased, this object was no longer accomplished, and enjoyment which had been had for many years was defeated by proof of its commencement subsequently to that date. So in a case in the 30th and 31st year of Elizabeth, after the plaintiff had obtained a verdict for the obstruction of his ancient lights, it was moved by the defendant in arrest of judgment, "that there upon the declaration appeareth no cause of action; for the window, for the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected, *scilicet*, in the reign of Queen Mary. The stopping of which by any act upon my own ground was holden lawful and justifiable by the whole court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatever, and such was the opinion of the whole court"(d). Another report of the same case states that it was agreed by all the justices, "that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the

(c) By inference from 3 Edw. I. c. 29, which fixed that as the period within which the demandant in a writ of right must have alleged seisin. 2 Roll. Abr. 269; Prescription M., pl. 14.

(d) *Bowry v. Pope*, 1 Leo. 168.

other's lands, and this house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other's land; and it was adjudged accordingly" (e).

This rule was found to operate more and more harshly as the period which had elapsed since the commencement of the time of legal memory became longer. In 1623, the Statute of Limitations, 21 Jac. I., c. 16, was passed. The first section of this enacted, "that no person who has any right or title of entry shall enter but within twenty years next after his right or title shall accrue."

As no person could enter after that lapse of time, it followed that none could after that lapse maintain an ejectment, as this action is founded on an entry, real or fictitious. Accordingly, adverse uninterrupted possession for twenty years became a bar to an ejectment, and sufficient to give a man a title on which he could recover in ejectment. By a natural analogy the same length of time which conferred a title to land or to a house, was considered sufficient to confer a title to an easement belonging to the house (f).

But in cases both of prescription and of occupation

(e) S. C. nomine *Bury v. Pope*, Cro. El. 118.

(f) "Twenty years was sufficient to give a man a title in ejectment, on which he might recover the land itself; and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house." *Lewis v. Price*, 2 Wms. Saund. 175a. per Wilmot, J. "If my possession of the house cannot be disturbed, shall I be disturbed in my lights?" *Dougal v. Wilson*, 2 Wms. Saund. 175a, per Wilmot, C. J.: and so *Cross v. Lewis*, 2 B. & C. 686; 4 D. & R. 234.

for twenty years, the right to window lights was, in theory, considered as arising originally from agreement between the parties, the owners of the dominant and the servient tenements. Twenty years uninterrupted enjoyment of window lights, therefore, did not operate as an absolute bar incapable of being overturned by contrary proof; but it was presumptive proof from which the jury were directed to find the existence of an agreement.

So Lord Mansfield said, "The enjoyment of lights with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that, unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a statute of limitation; it is certainly a presumptive bar which ought to go to a jury. Time immemorial itself is only presumptive evidence" (*g*).

So also in a case where the plaintiff's lights had been enjoyed for more than twenty years, the defendant offered evidence that twenty-five years before the then owner of his premises had granted liberty to the plaintiff's predecessor to put out a particular window, and argued that it must be presumed that this was the only grant ever made to the plaintiff or his predecessors. Although the judge, Gould, J., thought the grant had nothing to do with the windows for the obstruction of which the action was brought, he considered the point a proper one to leave to the jury, if the counsel for the defendant wished it (*h*). And in another case, the plaintiff, who was a tenant for a term

(*g*) *Darwin v. Upton*, 2 Wms. Saund. 175b, c.

(*h*) *Ibid.*

of years, had built a workshop for the purposes of his trade, removable as between landlord and tenant, and had opened a window in this building. It was held, that no covenant from the owner or occupier of the adjoining land could be implied under such circumstances (i).

Moreover, under the old law, the rule, that twenty years' uninterrupted possession was evidence from which a jury might presume a grant, had to be taken with the qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years had no power to grant any such right for a longer period than during the continuance of his particular estate. If a tenant for life or years permitted another to enjoy an easement on his estate for twenty years or upwards without interruption, and then the particular estate determined, such user would not affect him who had the inheritance in reversion or remainder; but when it vested in possession he might dispute the right to the easement (j).

It was accordingly held in a case where a person had put out lights and enjoyed them for more than twenty years without interruption from the owner of the opposite premises, who was a tenant for years, that the enjoyment of such an easement without the knowledge of the landlord would not affect the latter on the determination of the lease; and, consequently, that a succeeding tenant under the same landlord was not liable to an action for raising his premises, and thereby obstructing the opposite light (k). It was also settled

(i) *Maberley v. Dowson*, 5 L. J., K. B. 261.

(j) *Yard v. Ford*, 2 Wms. Saund. 175e.

(k) *Daniel v. North*, 11 East, 372. Vide as to the application of this

that a tenant could not by his own admission bind his landlord (*l*). And where lights had been enjoyed for more than twenty years over land part of a glebe, which was then, under 55 Geo. 3, c. 147, conveyed to the defendant, and he built thereon and obstructed the light; it was held, that even if a grant could be presumed, it must have been made by a tenant for life, and therefore was invalid (*m*).

The rigour of this rule was indeed relaxed in practice by the landlord's knowledge being implied from the circumstances of the case. As in one instance, where a piece of the waste land had been enclosed, Lord Ellenborough laid down, that the continuous view of the steward acting under the same lord without objection might be sufficient ground for the jury to presume a licence (*n*).

And even more liberal were the suggestions of Shadwell, V.-C., before whom it was argued that a dean and chapter could not grant an easement so as to injure their successors, and that no grant could be presumed against a body who were incapable of making one. The Vice-Chancellor said, "The right which a man has in his own property is materially affected by the manner in which the owners of the adjoining property have dealt with their property. Therefore it does not follow, because the Dean and Chapter of Westminster cannot injure their successors, that the circum-

decision, *Cross v. Lewis*, 2 B. & C. 686; 4 D. & R. 234. The same rule has been applied since the Prescription Act to a right of way. *Bright v. Walker*, 1 C. M. & R. 211.

(*l*) *Reg. v. Bliss*, 7 Ad. & E. 554.

(*m*) *Barker v. Richardson*, 4 B. & Ald. 579. To the same effect are *Wall v. Nixon*, 3 Smith, 316; *Wood v. Veal*, 5 B. & Ald. 454.

(*n*) *Doe d. Foley v. Wilson*, 11 East, 56.

stance of houses having been built on the adjoining land may not of itself operate as a reason, at law, why the dean and chapter should not have the right to erect the building in question." The same reasoning, he implied, would apply to the crown (*o*).

Still in very many cases the acquisition of a right to window lights over land occupied by tenants for life or years was difficult, if not impossible. And the general rule of law that enjoyment to give a title to an easement must be neither by force, stealth, or favour," *nec vi, nec clam, nec precario*," placed other obstacles in the way of its acquisition (*p*).

In this state of things, in 1832, the statute of 2 & 3 Will. 4, c. 71, known as the Prescription Act, was passed. The object of this act was to shorten the period of prescription, and to make possession a bar or title of itself, instead of having recourse to the intervention of a jury to make it so (*q*).

The sections of the act which relate to the acquisition of the right to window lights are as follows:—

*Sect. 3.* "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

*Sect. 4.* "Each of the respective periods of years

(*o*) *Sutton v. Lord Montfort*, 4 Sim. 564.

(*p*) Co. Litt. 113b.

(*q*) *Bright v. Walker*, 1 C. M. & R. 218.

hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."

Since the passing of this act, the right to window lights, acquired by occupancy, has become a matter *juris positivi*, depending on positive enactment; and is no longer to be rested on any supposed presumption of grant or fiction of a licence.

In the great case of *Tapling v. Jones* (r), Lord Westbury, C., said, "It is material to observe that the right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the courts treating the right as originating in a presumed grant or licence."

And in the same case it was said by Lord Chelmsford, "The courts of law formerly held that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner, or, in other words,

(r) 11 H. L. Cas. 290; 34 Law J. Rep. N. S., C. P. 342.

that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act turned this presumption into an absolute right, founded upon user on one side, and acquiescence on the other. It was argued that under the act the right to the enjoyment of lights was still made to rest on the footing of a grant; this position seems to me to be contrary to the express words of the statute."

"By the Prescription Act, then, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property, that he can do nothing upon his premises which may have the effect of interrupting them."

Since the passing of this act, the rule before alluded to, that the possession required to confer a right to an easement must be "*nec vi, nec clam, nec precario*," seems no longer to have any application to the acquisition of the right to window lights by occupancy. Force cannot be employed, for the easement is to be acquired by acts done upon a man's own soil. Stealth is out of the question in the case of a continuous easement like this, which, moreover, is what the French Code calls "an apparent servitude," one the existence of which is shown by external works (*s*). And as to favour, it is to be remarked, that the 3rd section makes the exception in behalf of light of not requiring the enjoyment of it to be "by a person claiming right thereto," in order to draw to itself after the lapse of the prescribed time the character of a right.

(s) Code Civil, 689. "Les servitudes apparentes sont celles qui s'annoncent par des ouvrages extérieurs, tels qu'une porte, une fenêtre, un aqueduc."



The right to window lights is declared to become *absolute and indefeasible* after the enjoyment for twenty years, and it is by these words exempted from being affected by the savings in sect. 7, which exclude from the computation of the period of enjoyment the time during which the person otherwise capable of resisting any claim has been an infant, idiot, non compos mentis, feme covert, or tenant for life. Sect. 8, containing other savings, only applies to the acquisition of a right by a user for forty years. The result is, that, under the 3rd section of the Prescription Act, twenty years' uninterrupted enjoyment of window lights (unless such enjoyment be had under a written agreement) confers an absolute and indefeasible right to them, without regard to the circumstance that the neighbouring premises have been during a part or the whole of that period in the occupation of a tenant for life or years, or that the owner of the inheritance was ignorant of the user, or that he was not capable of granting an easement so as to bind his successors. And decisions to this effect are numerous.

"It may be, that if a man opens a light towards his neighbour's land, the reversioner may have no means of preventing a right thereto being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the right is enjoyed only by consent" (t).

"The right to window lights may now (as the enjoyment need not now be of right) be gained, not only

(t) *Fremien v. Philips*, 11 C. B., N. S. 455, per Pollock, C. B. (acknowledgment must, of course, mean an acknowledgment by writing).

without the consent, but also without the knowledge of the servient owner" (*u*).

And Lord Cranworth said, that a tenant for life might allow his adjoining neighbour to acquire an absolute and indefeasible right to the access of light over tenant for life's land, and the remainderman could do nothing to prevent this right accruing (*v*).

These decisions show that the right to window lights, when once acquired, is acquired against all the world. But there are certain conditions which must be complied with in order that the enjoyment may be of a character capable of conferring the right.

The first of these conditions is, that the enjoyment must be had, during the whole period required by the statute, in the character of an easement, distinct from the land over which it is had, and on which it is sought to impose the easement.

This was laid down in the case of *Harbridge v. Warwick* (*w*). In that case the plaintiff and his father had occupied a house for sixty years, and had also occupied a garden adjoining, as tenants from year to year. The plaintiff claimed for the house a right to window lights over the garden.

But the Court of Exchequer ruled, firstly, that since, as far as the memories of witnesses went, the house and garden had been in the possession of the same persons, no grant could be presumed; and, secondly, that no

(*u*) *Jones v. Tipling*, 12 C. B., N. S. 853; 31 Law J. Rep. N. S., C. B. 349, per Bramwell, B.

(*v*) *Tipling v. Jones*, 11 H. L. Cas. 312; 34 Law J. Rep. N. S., C. B. 348.

(*w*) 3 Ex. 552. So, *Onley v. Gardiner*, 4 M. & W. 496 (of a right of way).

right arose under the third section of the Prescription Act. In deciding the latter point, Parke, B., said: "What then is the enjoyment contemplated by the third section? We think it clear that, notwithstanding the absence of the words in the second section above referred to ('by any person claiming right thereto'), it converts into an easement such an enjoyment only of the access of light over contiguous land as had been had for the whole period of twenty years, in the character of an easement, distinct from the enjoyment of the land itself. The legislature contemplated such a right as might be interrupted by the adjoining occupier, at least during some part of the time."

And in another case the Court of Common Pleas held, that the enjoyment of the easement claimed must be continuous for the prescribed number of years next before the commencement of the suit, without interruption acquiesced in for a year. Therefore a unity of possession during that time will defeat the claim, although such unity of possession has its inception after the completion of enjoyment for the prescribed number of years. It is true that the easement claimed was a right of way, and that the decision was upon the terms of the second and fourth sections of the act; but the same principles seem to apply to the interpretation of the terms of the third and fourth sections (x).

Secondly, if it appear that the access of light was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing, then, by the terms of the third section, the enjoyment will not be converted into a right after the expiration of the twenty years.

(x) *Battishill v. Reed*, 18 C. B. 696.

This provision is so plain that it is scarcely possible for any question to arise upon it. But in one case (*y*), in which the access of light had been enjoyed for more than twenty years, under a permission verbally given by the person having the right to obstruct, and rent had been paid in acknowledgment of that permission, it was argued that no easement was acquired. The court, however, overruled the objection.

It may possibly be held, that in such a case the enjoyment of the easement is subject to the payment of the usual rent. This view is supported by *Gray's Case* (*z*), where the plaintiff was acknowledged to be entitled to common of pasture, paying *pro eadem communia unam gallinam et quinque ova annuatim*; and by the case of *Lovelace v. Reynolds* (*a*), where it was part of the prescription claimed to pay a penny annually.

Thirdly, it is required by the act that the access of light shall have been actually enjoyed for the full period of twenty years without interruption. By the fourth section it is provided, that "no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

Interruption, as was decided in a case upon the first section of this act (*b*), must be "an obstruction by the

(*y*) *Mayor of London v. The Pewterers' Company*, 2 Moo. & R. 409.

(*z*) 5 Rep. 78b.

(*a*) Cro. El. 546. At page 563, a decision was given against the prescription.

(*b*) *Carr v. Foster*, 3 Q. B. 581.

act of some other person than the claimant, not a cessation by him of his own accord, in order to defeat the acquisition of a prescriptive right under the act." What effect such voluntary cessation may have as evidence of the abandonment and consequent loss of the right, will be a subject for future discussion.

On the second section it has been decided that an interruption, though acquiesced in for a year, may defeat the acquisition of the easement, by showing that the enjoyment never was of right (c). This has no reference to the acquisition of light, for, as before stated, the third section omits all reference to the enjoyment being as of right.

It was argued in one case, that the payment of rent under a parol agreement for the user of lights was such an interruption or evidence of interruption of the enjoyment within the meaning of the act as to prevent the accruer of the statutory right. But the Court of Exchequer Chamber decided against this contention. Lord Campbell, C. J., in delivering the judgment of the court, said, "The simple question is, whether the payment of a certain sum of money a year, by way of rent, for the user of these lights, is evidence of an interruption of the enjoyment of the right. I think clearly that it is not. For the interruption in the third section of the 2 & 3 Will. 4, c. 71, must be such an interruption as that contemplated in the fourth section. Looking at the sections together, I think there must be an actual discontinuance of the enjoyment, by reason of an obstruction which is submitted to or

(c) *Eaton v. Swansea Waterworks Company*, 17 Q. B. 267.

acquiesced in for a year. There has been none such here (*d*).

Where an obstruction to an ancient light had existed for more than twelve months, but the defendant had promised to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken, *Kindersley, V. C.*, held, that there had not been such an interruption of the enjoyment for twelve months as to deprive the plaintiff of his remedy (*e*). And in a case upon the second section of the act, it was held by the Court of Queen's Bench, that acts of resistance to an interruption, within twelve months of bringing the suit, and before the interruption has been interrupted for a year, prevented the plaintiff's right under the Prescription Act being ousted by the fourth section (*f*).

By the terms of the fourth section, an interruption of the enjoyment, in whatever period of the twenty years it may occur, cannot be deemed an interruption within the meaning of the act, unless it be acquiesced in for a whole year. Hence follows the somewhat curious result, that a statutory title to the right to window lights may be gained by enjoyment for nineteen years and a portion of a year followed by an inter-

(*d*) *Plasterers' Company v. The Parish Clerks' Company*, 6 Ex. 635. Lord St. Leonards remarks (in his *Treatise on the Real Property Statutes*, 2nd edit. p. 174), that the question was not brought before the court on the bill of exceptions, whether the payment might not be made use of to show that this was not such an enjoyment as was contemplated by the statute as capable of conferring the right. This point was, however, decided in *The Mayor of London v. The Pewterers' Company*, 2 Moo. & R. 409, ante, p. 27.

(*e*) *Gale v. Abbott*, 8 Jur. N. S. 987.

(*f*) *Bennison v. Cartwright*, 33 Law J. Rep. N. S., Q. B. 137.

ruption for the remaining portion of the last year This was decided by the House of Lords (*g*).

Lastly, it must be observed that, by the terms of the fourth section, the prescribed number of years during which enjoyment of an easement must be had in order to acquire a statutory title thereto must be the years next before action brought (*h*).

And, as a corollary to this rule, in a case where the defendant justified under the Prescription Act for turning water impregnated with metallic substances into the plaintiff's watercourse, it was held that a plea alleging forty years' enjoyment before the commencement of the suit was sufficient, and that enjoyment for that period before the commission of the act complained of need not be alleged (*i*).

It has also been held, upon the words of the third and fourth sections of the act, the twenty years' enjoyment before *any* suit or action in which the plaintiff's claim to light and air is brought in question is sufficient to confer the statutory right, and not of necessity twenty years' enjoyment before the suit or action then in progress. "I think the intention was to give enjoyment under the act the same effect as the evidence which would sustain a prescriptive claim before the act, except that the terminus of the statutory enjoyment must be a

(*g*) *Flight v. Thomas*, 11 Ad. & E. 688 ; 8 Cl. & F. 231.

(*h*) *Parker v. Mitchell*, 11 Ad. & E. 788 ; *Richards v. Fry*, 7 Ad. & E. 698 ; *Ward v. Robins*, 15 M. & W. 237 ; *Lowe v. Carpenter*, 6 Ex. 825. In this case Parke, B., suggested that some act of user ought to be shown to have occurred once at least in every year of the prescribed number. But this, if so in any case (which may be questioned), would, of course, not apply to a continuous easement.

(*i*) *Wright v. Williams*, 1 M. & W. 77.

suit or action which discloses the nature of the claim, and gives an opportunity of litigating it. I need hardly refer to authorities (*j*) to show that the evidence to sustain a prescriptive claim before the act need not have come down to the commencement of the suit, nor to any defined period (*k*).

To support a claim to the statutory right, enjoyment during the whole period prescribed by the statute must be proved; and it is not allowable for a jury to infer enjoyment for the whole period from proof by the claimant of enjoyment for a part of the period (*l*).

But evidence of enjoyment before the required period is admissible in order to prove enjoyment during the period. And in a case where a claim of a right of way under the second section was thus supported by proof of enjoyment more than forty years back, *Littledale, J.*, said, "If evidence of user beyond forty years were to be excluded, it might be that, after the case had been carried as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three remaining years, and the party might fail, because he was unable to carry his case on without going to the distance of forty-one years (*m*).

The statutory right may be acquired by one tenant

(*j*) Vide *Ward v. Ward*, 7 Ex. 838.

(*k*) *Cooper v. Hubbuck*, 12 C. B., N. S. 470, per Willes, J. In this judgment, Erle, C. J., and Byles, J., concurred, but Williams, J., dissented from it.

(*l*) *Bailey v. Appleyard*, 8 Ad. & E. 161, note at p. 778.

(*m*) *Lamson v. Langley*, 4 Ad. & E. 890. And Lord Denman, C. J., was apparently of opinion that proof of user of the way at any time, however remote, could hardly be excluded. This decision is plainly at variance with the dictum of Parke, B., in *Lowe v. Carpenter*, 6 Ex. 825, before referred to in n. (*h*).



against another under the same lessor. This was decided by the Court of Exchequer Chamber in the case of *Frewen v. Philips* (n).

And the result of the decision of the case of *Jacomb v. Knight* (o), when Romilly, M. R., said, "The rule as to unity of possession only meant, that when A. and B., being the owners of two separate freeholds, let them both to the same tenant, the one tenement could not acquire any right of easement over the other," seems to be, that a tenant can acquire the statutory right against his landlord.

The words in the third section of the act, "any local usage or custom to the contrary notwithstanding," appear to refer especially to the custom of the city of London prior to the passing of the act. According to this custom, the owner of any house within the city of London was entitled to raise it or to build on its site any height he pleased, notwithstanding that by so doing he might obstruct his neighbour's ancient lights.

The first allusion to this custom is found in the case of *Hughes v. Keeme* (p), in which three points were decided:—

(1.) That, there being no custom, it is not lawful

(n) 11 C. B., N. S. 449.

(o) 32 L. J. Rep., N. S., Ch. 601, 3 L. R. 49. The decision, however, seems to be put by his Honour on the ground of contract.

(p) Caltrop. 1; Yel. 215; 1 Bul. 115; God. 183. The second point was decided in *Bland v. Moseley*, in the King's Bench in 29 Eliz. cited 9 Rep. 58b; and Caltrop. 6. There the custom of York was pleaded, that a man might build on a void piece of ground so as to obstruct his neighbour's ancient lights, and it was adjudged that the custom was nought. For that one prescription could not take away another, and also there might have been a grant to have those windows by the owner of the land before time of memory.

to erect a new house upon a void piece of ground, whereby the old lights of an ancient house may be stopped.

(2.) That the custom of London will not enable a man to erect a new house upon a void piece of ground, whereby the old lights of an ancient house may be stopped, for prescription against prescription will never be allowed by the law.

(3.) That if the new house be only erected on the ancient foundation, without enlargement either in longitude or latitude, howsoever it be made so high that it stoppeth up the lights of the old house, yet he is not subject unto any action, because the law authoriseth a man to build as he may upon his ancient foundation.

At the period when this case was decided, the custom of London appears to have been almost identical with the common law. The only difference seems to have been, that by the custom of London the existence of a building prevented the imposition by prescription of any obligation on the owner of that building to refrain from interfering with the enjoyment of window lights by his neighbour. This was possibly because the existence of the building was considered evidence that no such uninterrupted enjoyment had been had by the neighbour since the time of legal memory as was required to confer the prescriptive right.

But after the introduction of the doctrine that a grant of window lights might be inferred from enjoyment for twenty years, the custom became of very great importance, as excluding the application of the doctrine within the city of London. The custom of the city of London in this behalf, as in respect of the

amount of personalty which might be disposed of by will, and of the disposition of the estates of intestates, seems to have been the old law of the land retained unaltered, after it had been modified in the rest of the country by a gradual alteration. And in each instance the custom has remained until swept away by statute (*p*).

In *Plummer v. Bentham* (*q*), the recorder of London appeared at the bar of the King's Bench, and certified *ore tenus* that there was an ancient custom in the city of London that a person might increase the height of his *house*, or build upon its ancient foundations, though he thereby obstructed his neighbour's ancient lights, but that such custom did not extend to any *erection or building*.

The custom was confined to cases where all the four walls of the old foundations belonged to the person claiming the benefit of the custom (*r*).

In one case before the Prescription Act, it was

(*p*) The limitations of the power of testamentary disposition by 2 Geo. I. c. 18, the peculiar disposition of the estates of intestates by 19 & 20 Vict. c. 94. It is curious that the same portions of the old law were retained as customs of the city of York, vide *Bland v. Moseley*, *ubi supra*, and Williams on Executors, 5th edit., Vol. I. p. 3, and Vol. II. p. 1374, *et seq.*

(*q*) 1 Bur. 248. Such an event as this appearance of the recorder at the bar of this court, to certify, *ore tenus*, the custom of the city of London, had not occurred since the reign of Henry VI.; and a consultation was held in the city as to the costume in which their recorder ought to appear. It was finally settled that it ought to be "the purple cloth robe faced with black velvet; and not his scarlet gown, his black silk gown, nor the common bar gown."

(*r*) *Shadwell v. Hutchinson*, 3 C. & P. 615, per Lord Tenterden, C. J.

contended that, notwithstanding this custom, a grant of the right to window lights might be presumed from twenty years' enjoyment. But Sir Thomas Plumer, M. R., said, "It is rightly said that the presumption of a grant would exclude the custom; *quilibet potest renunciare juri pro se introducto*, and it is argued that possession for twenty years is equivalent to and affords presumption of a grant. I cannot accede to that argument; to admit it would be to abolish the custom, which could no longer be applicable to any case. The city would then be subject to the same rule as any other part of the kingdom. Before the expiration of twenty years, neither in the city nor elsewhere, could any right arise to prevent such obstruction of light; and if, after twenty years, the citizens of London were as much restrained as the inhabitants of every other part of the kingdom, what becomes of the custom? There is no ground therefore for presumption, from the acquiescence of one party, or the enjoyment of the other, without a written title (s)."

But in *The Salters' Company v. Jay* (t), it was decided that the custom of the city of London was no defence to an action for building so as to interfere with window lights enjoyed for the time and in the manner prescribed by the Prescription Act; and, indeed, that the words in the third section referred expressly to this custom.

Lord Denman once said of *The Salters' Company v. Jay*, "That case was not much considered. I myself thought there might have been more argument upon it

(s) *Wyntanley v. Lee*, 2 Swan. 341.

(t) 3 Q. B. 109.

than there was. I suppose the city of London was not a party to it" (u). But, subsequently to these expressions of Lord Denman, the Court of Exchequer decided the same point as in *The Salters' Company v. Jay*, in the same manner as it was decided in that case (v). And Lord Cranworth in *Yates v. Jack* (w), and Vice-Chancellor Wood in *Dent v. The Auction Mart Company* (x), treat the point as settled.

In a recent case it was suggested by counsel that the custom of London remained in force so far as it related to the access of air. But Turner, L. J., said that there was no evidence that the custom of London had applied to air as well as or distinct from light (y).

Where, however, the claimant of the right is thrown back upon the doctrine of a grant implied from twenty years' enjoyment, the custom of the city of London may be used to resist his claim. For the act does not abolish the custom, but declares that the statutory right arises when the conditions thereof are fulfilled, notwithstanding the custom.

In one case since the Prescription Act, it was attempted to establish a right to light and air by enjoyment for twenty years, although the claimant had no building in respect of which he claimed the right. The defendant, in justification of a trespass in knocking down a wall, pleaded that the wall obstructed the passage of light and air to his timber yard and saw-pit, and that he was entitled thereto for drying his timber.

(u) *Reg. v. Mayor of London*, 13 Q. B. 1.

(v) *Truscott v. The Merchant Tailors' Company*, 11 Ex. 855.

(w) L. R. 1 Ch. 295 ; 35 Law J. Rep., N. S., Ch. 539.

(x) L. R. 2 Eq. 238 ; 35 Law J. Rep., N. S., Ch. 555.

(y) *The Curriers' Company v. Corbett*, 11 Jur., N. S. 719.

Patteson, J., said, "In his opinion the plea could not be supported in point of law. If such a plea could be sustained, it would follow that a man might acquire an exclusive right to the light and air, not only (as heretofore) by having been suffered to build on the edge of his property, and suffered for a certain space of time to enjoy that building without interruption, but merely by reason of having been in the habit of laying a few boards on the ground to dry. Such a rule would be very inconvenient and very unjust. Still the question in that state of the proceedings was, whether the plea was proved in point of fact." (z). And as it was not so found, the point of law did not arise. Still the expressions of the eminent judge who tried the case are very strong against the goodness of the claim.

Perhaps the possibility of establishing a claim to such a right may be illustrated by reference to the cases of claim to the free passage of air to a windmill, of which several are to be found in the books.

In an old case *Winch, J.*, said "That when one erected a house so high that wind was stopped from the windmills in Finsbury Fields, it was acknowledged that the house should be broken down" (a).

And in another case, it was found "that but two feet of the defendant's house obstructed the plaintiff's mill; and judgment was given that these two feet should be abated" (b). But the claim does not seem to have been viewed favourably by the court. "For where the house was situate about eighty feet from the said mill, and in height it did extend above the top of the mill,

(z) *Roberts v. Macord*, 1 Moo. & Rob. 230.

(a) *Anon.*, *Winch's Rep.* 3; *Vin. Abr. Nuisance*, G. pl. 19.

(b) *Trahern's Case*, *God.* 233; 2 *Roll. Abr.* 704, *Triall*, pl. 23.

and in length it was twelve yards from the mill; notwithstanding this nearness, the court directed the jury to find for the defendant" (c).

In a late case before the Courts of Common Pleas and Exchequer Chamber, it was held, firstly, that such an easement as the free passage of air to the sails of a windmill is not within the second section of the Prescription Act, which is confined to easements to be exercised over the surface of the adjoining land. Secondly, that a presumption of a grant from twenty years' enjoyment will not arise, from the practical impossibility of preventing the exercise of the right claimed (d).

The result of these cases seems to be, that this right of free passage of air to the sails of the mill is one known indeed to the English law; but one to which neither the doctrine of a grant implied from user for a certain number of years nor the terms of the Prescription Act will apply. And, therefore, it can only be claimed by prescription since the time of legal memory. The right claimed in *Roberts v. Mucord* probably rests on the same footing. The easement there claimed cannot be said to be exercised over the surface of the adjoining land more than that claimed in *Webb v. Bird*. And the words of the third section, to and for any dwelling-house, workshop, or other building, exclude it from the benefit of that section. And as there is no apparent sign by

(c) *Goodman v. Gore*, God. 189. It may be remarked, that in this case a discussion arose as to the right form of pleading, and the clerk said that *per quod ventus impeditur* was the usual form. As this is the first case reported on the subject (10 Jac. 1), there must have been other precedents thereon, not now preserved.

(d) *Webb v. Bird*, 10 C. B., N. S. 268; 13 C. B., N. S. 841.

which the enjoyment is manifested, it would probably be considered as enjoyed by stealth, and from enjoyment of such a character no grant could be presumed.

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## SECTION II.

### *Of the Acquisition of the Right by Express Agreement.*

An easement, like other incorporeal hereditaments, can at law be created only by an instrument under seal. The proper form of this is a grant. "Grant," says Lord Coke, "is properly of things incorporeal, which, as hath been said, cannot pass without a deed" (e).

The history of the controversy whether an easement can be created by parol license, or whether a deed is required for that purpose, is so elaborately gone through in the last edition of Mr. Gale's valuable work on "Easements," that it is not intended to repeat the discussion here. It will suffice to give a brief summary of the conclusions there arrived at.

The cases on which the opinion that an easement can be created by a parol licence has been founded are, *Webb v. Paternoster* (f); *Wood v. Lake* (g); *Winter v. Brockwell* (h); *Liggins v. Inge* (i); *Wood v. Manley* (k), and *Taylor v. Waters* (l).

(e) Co. Litt. 9b.

(f) Palm. 71; Roll. 143, 152; Noy, 98; Pop. 151; God. 282.

(g) Sayer, 3.

(h) 8 East, 308.

(i) 7 Bing. 682.

(k) 11 Ad. & E. 34; 3 Per. & D. 5.

(l) 7 Taunt. 374.



In *Webb v. Paternoster*, it is not clear that the licence was a parol licence, as the plaintiff is spoken of as a grantee; or possibly the licence was a licence coupled with an interest. Moreover, the judgment of Doddridge, J., in that case is in strict accordance with the opposite doctrine. *Wood v. Lake* was possibly decided on the ground, that the action was an action of *assumpsit* founded on promise. If not, it is expressly overruled in *Wood v. Leadbitter (m)*. *Wood v. Manley* was a case of licence coupled with an interest. *Taylor v. Waters* is to the point; but, after being doubted by the Court of King's Bench, was disregarded by the Court of Exchequer in *Wood v. Leadbitter*, as being to the last degree unsatisfactory, as contrary to principle and to the earlier authorities and founded on misconception of previous cases. *Winter v. Brockwell* and *Liggins v. Inge* were cases of licence being granted by the owner of the dominant to the owner of the servient tenement to do some act on his own land, the necessary consequence of which is the extinguishment of the easement.

The doctrine that an easement can only be created by deed is supported by a long series of authorities (n).

But two cases may be especially cited in which the question has been elaborately discussed, and the decisions have been to this effect. The first of these is *Hewlins v. Shippam (o)* in the King's Bench. There, the de-

(m) 13 M. & W. 838.

(n) *Bradley v. Gill*, 1 Lut. 69; *Fentiman v. Smith*, 4 East, 107; *Rex v. Inhabitants of Hordon-on-the-Hill*, 4 M. & S. 562; *Bryan v. Whistler*, 8 B. & Cr. 288; 2 Man. & Ry. 318; *Cocker v. Cowper*, 1 C. M. & R. 418; *Shepherd's Touchstone*, 230.

(o) 5 B. & Cr. 221; 7 D. & R. 783.

fendant, for a valuable consideration given to him by the plaintiff, assented to the plaintiff's making a drain at considerable expense in his land. In an action brought against the defendant for afterwards stopping up the drain, Graham, B., directed a nonsuit. A rule was obtained to set aside the nonsuit, but the court upon argument discharged it. Bayley, J., in delivering the judgment of the court, after reviewing all the authorities, said, "On these grounds, therefore, that the right claimed by the declaration is a freehold right, and that, if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed, we are of opinion that the nonsuit was right."

The other case, which authoritatively decides the question, is that of *Wood v. Leadbitter* (p). In this case the defendant, to an action for an assault and false imprisonment, pleaded that, at the time of the alleged trespass, the plaintiff was in a certain close of Lord Eglinton's, and that the defendant, as the servant of Lord Eglinton, removed him therefrom. The plaintiff replied that, at the time of such removal, he was in the said close "by the leave and license of Lord Eglinton." It appeared that the plaintiff had purchased a ticket for the stand at Doncaster, signed by Lord Eglinton. And the question in the case was, whether the leave given by such ticket was revocable; and, if so, whether without first returning the money paid for it. The court took time to consider its decision; and, in delivering the judgment, Alderson, B., said, "That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pe-

dantry to cite authorities in its support. All such inheritances are said emphatically to be in grant, and not in livery, and to pass by mere delivery of the deed. In all the authorities and text books on the subject, a deed is always stated or assumed to be indispensably requisite. And although the older authorities speak of incorporeal inheritances, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject matter: a right of common, for instance, which is a profit *à prendre*, or a right of way, which is an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple. If we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed." He then elaborately commented on the cases quoted in the plaintiff's behalf, and concluded that the case of *Taylor v. Waters* (q) was the only one necessarily supporting the plaintiff's proposition, that there the real difficulty was not discussed nor even stated, and concluded by giving judgment in favour of the defendant.

Mr. Gale gives as the result of the decided cases, that a man may, in some cases, by parol licence relinquish a right which he has acquired in addition to the ordinary rights of property, and thus restore his own and his neighbour's property to their original and natural condition (r); but he cannot, by such means, impose any burthen upon land in derogation of the natural rights of property (s).

(q) 7 Taunt. 374.

(r) This subject will be discussed in the fourth chapter.

(s) Gale on Easements, 3rd edit. 48.

But although at law an easement cannot be created without a deed under seal, yet when persons have, either by express covenant or by their tacit acquiescence in the creation of such a right, induced others to incur expense, such persons will be restrained by a court of equity from afterwards depriving them of the benefit of their expenditure by insisting on the want of a legal title.

The principles on which a court of equity will act in such cases are well laid down in *Dann v. Spurrier* (t), where Lord Eldon said, "I fully subscribe to the doctrine of the cases that have been cited, that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor(u) knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still it must be put upon the party to prove that case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that encouragement."

The principle on which this case was decided is one familiar to courts of equity (x). An instance of its application to the case of an easement will be found in *The Duke of Devonshire v. Eglin* (y). In that case

(t) 7 Ves. 231.

(u) The case was one between lessor and lessee.

(x) *Short v. Taylor*, 2 Eq. Cas. Abr. 522, pl. 3; *East India Company v. Vincent*, 2 Atk. 83; *Jackson v. Cator*, 5 Ves. 688, and cases there cited; *Rochdale Canal Company v. King*, 2 Sim. N. S. 78.

(y) 14 Beav. 530.

the defendant had consented to the plaintiff making a watercourse through his land, "upon condition of his being paid a proper and reasonable sum for his consent and permission." The watercourse was made at the plaintiff's expense, but no grant was executed, and no sum agreed on. After the watercourse had been used for nine years, the defendant stopped it up. It was held, that the plaintiffs were entitled to the use of the watercourse; a perpetual injunction was granted to restrain the defendant from obstructing it, and it was referred to the Master to settle a proper deed, and to ascertain a proper compensation.

Another and an earlier instance is found in the *Watercourse Case*(z). "A. diverted a watercourse, which put B. to great expenses in laying of soughs, &c., and the diversion being a nuisance to B., he brought his action, but an injunction was decreed upon a bill instituted for that purpose, it being proved that B. did see the work when it was carrying on, and connived at it, without showing the least discouragement, but rather the contrary."

On another occasion, Lord Loughborough said, "There was a case, I do not know whether it came to a decree, against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had made a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground; and when the work was begun, he said he would not give the road. The end of it was, he was made sensible,

(z) 2 Eq. Cas. Abr. 522, pl. 3.

I do not know whether by decree or not, that he was to give the road (a).

Other cases are reported to the same effect (b), but most in point are two recent decisions; the first is that in *Davies v. Marshall* (c). In that case a landlord had granted a lease of certain premises, together with the ancient lights appurtenant thereto, in consideration of certain improvements, one of which was the opening of certain new windows. The landlord subsequently let the adjoining land to another person, who proceeded to block up the lights of these premises. It was held, that the case did not stand only on a footing of ancient lights, and that neither the landlord himself nor any one claiming under him could block up these new windows. The second is that in *Cotching v. Bassett* (d); here the owner of a dominant tenement, in the course of rebuilding, altered the ancient lights. This was done after communication with the owner of the servient tenement, and with the knowledge of his surveyor, but without any express agreement. The court granted a perpetual injunction to restrain the servient owner from obstructing the lights as thus altered.

In the case of window lights, it is probable that mere tacit acquiescence would not bind the owner of the adjoining premises. For, in this case, the conduct of a man laying out money in the improvement of his

(a) *Clavering's Case*, cited 5 Ves. 690.

(b) *Williams v. Earl of Jersey*, Cr. & Ph. 91; *Moreland v. Richardson*, 22 Beav. 596; *Powell v. Thomas*, 6 Hare, 300; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Somerset Coal Company v. Harcourt*, 24 Beav. 571; 2 De G. & J. 596; *Laird v. Birkenhead Railway Company*, Johns. 500.

(c) 1 Dr. & Sm. 557.

(d) 32 Beav. 101; 32 Law J. Rep. N. S., Ch. 286.

premises is natural enough, without implying a promise from his neighbour not to interfere with these improvements; but no man in his senses would lay out money upon his neighbour's land, unless under the security of a promise that the neighbour would not exercise his power of frustrating the object of that expense.

To return to the acquisition of window lights by agreement at law. We have seen that the right must be created by deed, and that this deed must be in the form of a grant, in order that the obligation may be binding at law upon all future owners of the servient tenement, and to avoid the legal rule that the burthen of a covenant does not, except in cases between landlord and tenant, run with the land (*e*).

It must, however, be remembered that it is not necessary to use any particular form of words in order to constitute a grant. A deed, which is in form a covenant, may operate as a grant. This will be the case where, upon the instrument, an intention appears to confer a right which will affect the land of the covenantor, and the right intended to be conferred is one capable of being made the subject of a grant, as an easement.

So, in a recent case in the House of Lords (*f*), it was held, that a covenant, that "all persons to whom certain minerals were allotted should not be subject to action for damage on account of damage done to the surface of the land by working the minerals," operated as a grant to such persons of a right to disturb the surface of the land, and therefore that the assignee of the covenantor could maintain no action on that ac-

(*e*) Vide ante, Chap. I.

(*f*) *Rombotham v. Wilson*, 8 H. L. Cas. 348.

count. "It is undoubted," said Lord Wensleydale, "that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose. If the words could only be read as amounting to a covenant, it must be admitted that such a covenant would not affect the land in the hands of the assignee of the covenantor; but if they amount to a grant, the grant would be unquestionably good, and bind the subsequent owners of the surface."

Applying this principle to the case of window lights, it would seem that from a covenant by the owner of the adjoining land, that he would not in any way obstruct the access of light and air to the windows of his neighbour's tenement, would be implied a grant from him to his neighbour of the right to window lights over his land.

It is remarkable that, in practice, express grants of the right to window lights are not to be met with. This probably arises from the exceptional and negative character of the right, which consists wholly in a restraint of the natural powers of the adjoining owner to use his own land in whatever manner he pleases; and in the consequent difficulty of framing a proper form of grant for such a right. Partly also it no doubt arises from the comparatively small commercial value of such rights up to a recent date.

Express covenants to refrain from interfering with a neighbour's enjoyment of light and air are also rare. Their place has been supplied by covenants by a man to refrain from using his own land in some particular way; as for instance, that he will refrain from building on it, either wholly or in part, or above a certain height.



From such covenants the effect follows that the neighbour will enjoy his window lights uninterrupted; but such uninterrupted enjoyment is not stated by the covenant as the intended, nor is it the primary object thereof. Still, as the right to window lights is often secured by such covenants, it is necessary that their incidents should be discussed in this treatise. But as those incidents differ considerably from the incidents of the right to window lights properly so called, their discussion will be postponed to the fifth chapter, after the conclusion of the inquiry into the acquisition, extent, and loss of the ordinary right.

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### SECTION III.

#### *Of the Acquisition of the Right by Implied Agreement.*

This important mode of acquisition of the right falls into two divisions. In the first of these, there is an implied grant of the right to window lights, arising from the principle that a man cannot derogate from his grant. In the second, there is an implied grant of the right arising from the presumed intention of the person who was owner of two tenements, one of which enjoyed as quasi-easement over the other previously to their severance.

Mr. Gale indeed is of opinion that really the latter principle is that on which an implied grant of the right is always based. And he is also of opinion that in every case in which two tenements, the one quasi-dominant the other quasi-servient, are separated, such

an implied grant arises (*g*). This opinion is in great measure based on the rule of the French code as to the "destination du père de famille" (*h*).

It is conceived that neither of these opinions is consistent with English law; and that the authorities, especially some of more recent date than the last edition of Mr. Gale's work, warrant the division into two branches of cases of implied grant of the right, and disprove the opinion that such an implied grant arises

(*g*) Gale on Easements, 3rd edit. p. 82.

(*h*) The French law as to the "destination du père de famille" is as follows :—"On appelle destination du père de famille la disposition ou l'arrangement que le propriétaire de plusieurs fonds a fait, et souvent même, lorsque les choses sont fort anciennes, a laissé subsister pour leur usage respectif. Cet arrangement, d'après ce que nous venons de dire, doit être le résultat de signes permanents ; sans cela on ne pourrait en induire une volonté de créer une véritable assujettissement d'un fonds envers un autre. Quelquefois un fonds tire avantage d'un autre, sans être réciproquement assujéti à quelque incommodité qui établisse une sorte de compensation ; d'autres fois ce service est réciproque ; mais ces différences ne changent rien à la nature et aux effets de cette distribution. Si, par la suite, ces fonds viennent à appartenir à différens maîtres, soit par l'aliénation, soit par la disposition qu'en fait le propriétaire, soit par un partage entre ses héritiers, le service que l'un tiroit de l'autre, qui étoit simple disposition du père de famille lorsque ils appartenoient au même, devient service une fois que les objets passent dans les mains de propriétaires différens. C'est une présomption que la loi déduit de l'intention probable des parties ; mais comme toutes les présomptions de ce genre, elle n'a lieu qu'à défaut d'une volonté exprimée dans les titres, volonté qui pourroit être différent de ce que la loi présume."—*Pardessus. Traité des Servitudes*, 1838, Vol. II. p. 119. The Code Civil contains the following article on the subject :—"Si le propriétaire de deux héritages entre lesquels il existe une signe apparente de servitude dispose de l'un des héritages, sans que le contrat contienne aucune convention relative à la servitude, elle continue d'exister activement ou passivement en faveur du fonds aliéné ou sur le fonds aliéné."—*Code Civil*, 694.

in all cases of the severance of two such tenements. We now proceed to investigate the authorities.

First, as to the cases in which the implied grant arises from the principle that a grantor cannot derogate from his grant.

The case of *Palmer v. Fletcher* (i) is the first leading authority on the point. The fullest, and apparently most accurate, report of the case is that in Levinz. From this it appears, that A., having built a house, let the house to B., and the rest of the ground to C., that C. obstructed the lights of the house, and that B. brought an action against him for so doing. Three points were raised and discussed:—

(1.) A man builds a house on his own lands, and afterwards sells the house to one, and the land adjoining to another, who obstructed the lights. It was held that, although it be a new messuage, yet a person who claims the land by purchase from the builder cannot obstruct the lights any more than the builder himself could, who could not derogate from his own grant, for the lights are a necessary and essential part of the house. For, it is said in *Siderfin*, who speaks of the case as one between two lessees from the builder, “autrement serra in le poyar del lessor pur frustrate et avoid son grant demesne, car per son grant del meason les windows, gutters, &c., passer.” This was held by Twisden and Wyndham, JJ., *dubitante* Kelynge, J.

(2.) Had the land been sold first, and the house afterwards, the vendor might stop the lights, per Kelynge, J., but Twisden, J., held that he could not stop them in any case.

(i) 1 Sid. 167 ; 1 Lev. 122 ; 1 Keb. 553, 625, 794.

(3.) A stranger, having lands adjoining to a messuage newly erected, may stop the lights thereof; for the building of any man on his lands cannot hinder his neighbour doing what he will with his lands; otherwise, if the messuage had been ancient, so that he has gained a right in the lights by prescription. This was held by the whole court.

In *Bowry v. Pope* (*k*), the principle of the first point in *Palmer v. Fletcher*, that the grantor or one claiming under him cannot obstruct the access of light to the house sold, is assented to; though, as the defendant in that case was a stranger, the principle did not apply. And the same principle was enunciated in *Cox v. Matthews* (*l*), by Hale, C. J.

In *Rosewell v. Pryor* (*m*), Holt, J., said, "If a man have a vacant piece of ground, and build thereon, and that house has very good lights, and he lets this house to another; and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon to the annoyance of the lights of the first house; the lessee of the first house shall have an action upon this case against such builder, &c., for the first house was granted to him with all the easements and delights then belonging to it."

And again it was said by the Court of Queen's Bench, "If a man build next to a vacant piece of ground of his own, and then sell the new house, keeping the ground in his own hands, he cannot build upon the waste ground so as to stop the lights of the house; for, by sale of the house, all the lights and all neces-

(*k*) 1 Leon. 168.

(*l*) 1 Vent. 237, 239.

(*m*) 6 Mod. 116.

saries to make them useful pass; for by sale of the house, all the conveniences it has will pass; and as he himself cannot build to the prejudice of the new house sold, so cannot the lessee of the vacant ground do it: but if, in that case, he had sold the vacant ground without reserving the benefit of the lights, the court doubted in that case that vendee might build so as to stop the lights of his vendor, because he parted with the ground without reserving the benefit of the lights<sup>(n)</sup>." And in *Pomfret v. Ricroft* (o), it is stated as the result of the cases on the subject, "That no man can derogate from his own grant. Therefore, if I have a house with certain lights in it, and land adjoining, and I sell the house but keep the land, neither I, nor any one claiming under me, can obstruct the lights by building on the land; for by selling the house I sell the easement in the land also. So, *semble*, if I sell the land and keep the house, my vendee cannot obstruct the light by building on the land."

In *Canham v. Fisk* (p), Bayley, B., said, "If I have a house surrounded by my land, and sell the house, I sell the right to light from the windows. The sale of the house as it stands gives a right to the lights coming in at the windows, without necessity for twenty years possession of the easement."

In *Coutts v. Gorham* (q), it was decided that a tenant cannot obstruct the lights of a house demised by his lessor previously to his own lease.

(n) *Tenant v. Goldwin*, 6 Mod. 314 (vide also the cases there referred to); 1 Salk. 360; 2 Lord Raymond, 1089.

(o) 1 Wms. Saund. 323, note (D).

(p) 2 C. & J. 128; 2 Tyr. 157. The words quoted are taken from the latter report.

(q) 1 M. & M. 396.

And in a recent case before the House of Lords, in which the owner of two adjoining tenements granted one of them, it was held that anything which was used and was necessary for the comfortable enjoyment of the property which was granted, followed from the grant; and that certainly this was so if the conveyance contained the usual words (*r*).

And, lastly, in the case of *Herz v. The Union Bank of London* (*s*), in which the plaintiff had taken premises on which to carry on his trade as a diamond merchant, Stuart, V. C., said, "There appears to be no sound principle on which, when the demise of the house is to a person known to sustain such a character as that any diminution of the lights would disturb his enjoyment in that character, the reversioner can be allowed to withdraw or obstruct anything necessary to his enjoyment of the demised property in that character."

These authorities amply warrant the proposition, that when the owner of two properties, one of which under his ownership has enjoyed a continuous and apparent quasi easement (*t*) over the other, as the right to window lights, disposes of the window property which has enjoyed that quasi easement, there is at the same time an implied grant by him of the quasi easements which have been enjoyed therewith. So that if he parts with

(*r*) *Ewart v. Cochrane*, 7 Jur. N. S. 925. The case was Scotch, but it was stated that English and Scotch law was in this respect identical. It was followed and approved in *Hall v. Lund*, 1 N. R. 287; 9 Jur. N. S. 205.

(*s*) 2 Giff. 686; so, *Jacomb v. Knight*, 32 Law J. Rep. N. S., Ch. 601.

(*t*) This and similar terms, though barbarous, are of such great convenience that no apology for their introduction is necessary.

a tenement which has enjoyed the right to window lights over another part of his property, he, and consequently those claiming under him, are bound by an implied grant of the right, and are debarred from in any way using the part of the property retained so as to interfere with that right. They also warrant the further proposition, that this implied grant results from the general principle that a grantor cannot derogate from his grant.

This principle is considered also to apply when the owner of the two properties parts with them at the same time, or at times so near as to be virtually the same.

So, when houses were sold in lots almost at the same time by the same owner, the occupier of one was held able to maintain an action against the occupier of the other for obstructing his window lights, even though neither house was complete at the time of the sale (*u*).

And in another case, the plaintiff had purchased a house, and the defendant had at the same auction purchased the adjoining land, upon which a building one story high had formerly stood. In the conveyance to the plaintiff, the house bought by him was described as bounded by a piece of building land belonging to the defendant. In spite of this description, it was held that the defendant could not build to a greater height than one story, if by so doing he obstructed the window lights of the plaintiff's house. In delivering judgment, Tindal, C. J., said, "It is well established by the decided cases, that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells

(*u*) *Compton v. Richards*, 1 Price, 27.

the house to another person ; although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. And in the present case, the sales to the plaintiff and defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule (x)."

But it must be borne in mind, that, to come within the principle of these cases, the quasi easement must at the time of the disposition be continuous and apparent. Therefore, where at the time of the sale of the two tenements there were openings "wholly of an uncertain character, which would have been equally appropriate for a door, a window, or any other purpose to which such an opening might possibly be applied," no easement can arise in respect thereof (y).

Mr. Gale states that upon the severance of two tenements, if the grantor retains the quasi-dominant tenement, he will also retain the easements which have been enjoyed therewith under his ownership (z), provided such easements were apparent and continuous. It is conceived that this proposition is not maintainable and that upon such a severance there is no implied reservation of an easement, which at the time of the grant was enjoyed by the tenement retained, except it be expressly reserved. As the difference of opinion on

(x) *Swanborough v. Coventry*, 9 Bing. 305 ; 2 M. & Sc. 362.

(y) *Glave v. Harding*, 27 Law J. Rep., N. S., Ex. 286, per Bramwell, B.

(z) Gale on Easements, 3rd edit. p. 82, *et seq.* The opinion of the editors of Saunders' Reports seems to be the same, 1 Wms. Saund. 323, note (l).



this point is considerable, the authorities on the subject will be examined at some little length.

In *Palmer v. Fletcher* (a), the opinion of Kelynge, J., was "that if the land be sold first, and the house afterwards, the vendee of the land might stop the lights." But Twisden, J., was of a contrary opinion, and the question was not before the court in the case.

In *Tenant v. Goldwin* (b), it is said, "If in that case he had sold the vacant ground, without reserving the benefit of the lights, the court doubted, in that case, that vendee might build so as to stop the lights of the vendor, because he parted with the ground without reserving the benefit of the lights." In the report of this case in Salkeld there is no reference to this dictum. But in the report in Lord Raymond, it is given in stronger terms, and is ascribed to Lord Holt: "If he had sold the vacant piece of ground, and kept the house, without reserving the benefit of the lights, the vendee might build against his house."

In the case of *Riviere v. Bower* (c), at Nisi Prius, where the plaintiff, the owner of a house, divided it into two tenements, and let one of them, Abbott, C. J., held that the lessee was liable to an action on the case, for obstructing windows existing in the landlord's house at the time of the demise, although the windows were of recent construction, and there had been no stipulation against the obstruction at the time of demise.

So in *Pyer v. Carter* (d), where the owner of the adjoining houses sold one of them, it was held that the

(a) 1 Lev. 122.

(b) 6 Mod. 314 ; 1 Sal. 360 ; 2 Lord Raymond, 1089.

(c) Ry. & Moo. 24.

(d) 1 H. & N. 916 ; 26 Law J. Rep., N. S., Ex. 258.

purchaser was subject to the burden of existing drains beneath his house for the benefit of the property retained, without any express reservation, and the vendor and those claiming under him were entitled to have the use of such drains as they were used at the time of the sale.

But in a later case in the Court of Exchequer, the owners in fee of a house and adjoining land granted in 1855 a lease thereof to trustees for 99 years, under a covenant to build on it only according to a certain plan. In 1856, the owners conveyed the reversion in fee of the land to the trustees; and in 1857 conveyed the house to a person under whom the plaintiff claimed. The defendant, with the leave of the trustees, built upon the land first sold, so as to obstruct window lights of the plaintiff. The court held that no action was maintainable against the defendant for so doing, and that the restrictions in the previous lease did not affect the case. "My brother Petersdorff contends," said Martin, B., "that, notwithstanding the grant of the land in these (the most general) terms, the purchasers are restricted in their use of it, so that they cannot make any erection upon it which obstructs the light and air of the plaintiff's house. I know of no authority for that position. There is an absolute conveyance of the land, which, as against the grantor, gives every right which a grantee would have, that is, to use it in a lawful way" (e).

The decision of Lord Westbury in *Suffield v. Brown* (f), decided in 1864, may be considered to have finally settled this question. In that case the owner

(e) *White v. Bass*, 7 H. & N. 722.

(f) *Suffield v. Brown*, 33 Law J. Rep., N. S., Ch. 249; 3 N. R. 340.

of a freehold wharf and dock had allowed the bowsprits of vessels lying in the dock to project over the wharf, but there was no legal easement of this character prior to the unity of ownership. In 1845 he sold the wharf, without any reservation in the conveyance. He afterwards sold the dock. After the sale of the wharf, the bowsprits of vessels in the dock were still allowed to project over it, but not as of right. In 1863 the owner of the wharf commenced the construction of warehouses on it, which would prevent the bowsprits of vessels in the dock projecting over it, and would so confine the use of the dock to smaller vessels. Then the owners of the dock filed their bill for an injunction, and the Master of the Rolls granted a perpetual injunction, on the authority of *Pyer v. Carter* (g) and *Hinchcliffe v. The Earl of Kinnoul* (h). But, on appeal, Lord Westbury, C., dissolved the injunction, and dismissed the bill with costs, on the grounds that if the owner of two tenements grant one of them to a purchaser, and the grant be unlimited in terms and without express reservation, there is no implied reservation or re-grant, in favour of the tenement retained, of a quasi-easement which at the time of the grant was enjoyed with the tenement retained, though such quasi-easement were continuous or apparent. His lordship's judgment is so conclusive on the question, and so satisfactorily disposes of the supposed authorities for the opposite opinion, that it is given here nearly verbatim :—

“ The effect of this,” (the decision of the Master of the Rolls,) “ is, that if I purchase, from the owner of

(g) 1 H. & N. 916 ; 26 Law J. Rep., N. S., Ex. 258.

(h) 5 Bing. N. C. 1 ; 6 Sc. 650 ; 8 Law J. Rep., N. S., C. P. 105.

two adjoining freehold tenements, the fee simple of one of those tenements, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed to me as may be requisite for the enjoyment of the retained tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine. I believe it to be of a very recent introduction, and it is in my judgment unsupported by any reason or principle when applied to grants for valuable considerations. That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee simple of his tenement, and has it conveyed to him without any reservation. To limit the vendor's contract and deed of conveyance by the vendor's mode of using the property sold and conveyed is inconsistent with the first principles of law as to the effect of sales and conveyances. Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it, on which he has been for years in the habit of throwing out the cinders, dust and refuse of his workshops which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for the full enjoyment of the manufactory; and suppose that I, being desirous of extending my garden, purchase this strip of land, and have it conveyed to me in fee simple, and the owner of the manufactory afterwards sells the manufactory to another person. Am I to hold my

strip of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me, I certainly am so subject, for the case falls strictly within the rules laid down by his Honor, and it reduces them to an absurd conclusion.

“ The first introduction of this extraordinary doctrine appears to have been made in the following manner. A learned and ingenious author, the late Mr. Gale, published in the year 1839, a work of a great merit on this subject of easements, in which he derived from the doctrine of the French Code Civil certain rules with which he conceived that the law of England agreed; and inasmuch as these conclusions have been cited with approbation in some recent cases at common law, and as they form the principal support of the plaintiff's argument, it is right to state and examine them. The passage is this, ‘ The implication of the grant of an easement may arise in two ways, first, upon the severance of an heritage by its owner into two or more parts; and secondly, by prescription. Upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements; and secondly, of all those easements without which the enjoyment of the severed portions could not be had at all.’

“ It will be observed that the learned author is not here speaking of easements legally existing before the unity of possession, but of those which he supposes to arise for the first time by implication on the severance.

“ If nothing more be intended by this passage than to state, that on the grant by the owner of an entire heri-

tage of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety, for the benefit of the parcel granted, then there can be little doubt of its correctness; but it seems clear that the learned writer used the word 'grant' in the sense of reservation, a mutual grant, and intends to state that when the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing thereby granted as have been used by the owner for the benefit of the unsold part of the heritage during the unity of the possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the quasi-dominant or quasi-servient tenement.

"But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement, which remains the property of him the grantor. Consider the easements as if they were rights, members, and appurtenances of the adjoining tenement; they still admit of being aliened or released; and the absolute sale and grant of the land in or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner.

"Many rules of law are derived from fictions; and the

rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations, which accompany such portions when divided among the members of his family, or even, as it is said, in French law, when aliened to strangers. But this comparison of the 'disposition of the owner of two tenements' to the '*destination du père de famille*,' is a mere fanciful analogy, from which rules of law ought not to be derived; and the analogy, if it be worthy of grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership.

"And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer v. Carter*, being one of the two cases on which his Honor relies. In *Pyer v. Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely and without any reservation, and subsequently sold and conveyed the remaining house to another person. It appears that the second house was drained by a drain that ran under the foundation of the house first sold, and it was held that the second purchaser was entitled to the ownership of the drain,—that is, to

a right over the freehold of the first purchaser,—because, said the learned judges, the first purchaser takes the house ‘such as it is.’ But with great respect, the expression is erroneous, and shows a mistaken view of the matter; for in a question, as this was, between the first purchaser and the subsequent grantee of his vendor, the first purchaser takes the house, not ‘such as it is.’ but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor.

“It was held by the court that the easement was “apparent,” because the purchaser might have found it out by inquiry; but the previous question is, whether he was under any obligation to make inquiry, or would be affected by the result of it, which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case *Pyer v. Carter*, the true conclusion was, that, as between the purchaser and the vendor, the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor’s subsequent grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as an authority.

“But to the earlier cases cited by the court in *Pyer v. Carter*, as authorities for its decision, there can be no objection. In *Nicholas v. Chamberlaine* (i), it was decided that if the owner of a house, being also owner of the land surrounding it, make a conduit through part

(i) Cro. Jac. 121.



of the land to the house, and then sell the house with its appurtenances, the right to the conduit passes; that is to say, the court held that the conduit was a thing appertaining to the house, and as such passed under the conveyance; and in the same case it was also decided that if the owner sell the land, reserving the house, the right to the conduit is reserved, a decision which merely amounts to this, that as the grant of a house is a grant of it with its appurtenances, so the reservation of a house is a reservation of it with its appurtenances. To this case, and to the case of *Coppy v. J. de B.* (k), or the case of *Sury v. Pigot* (l), there can be no objection, but they do not give any support to the decision in *Pyer v. Carter*.

“The other case relied on by his Honor, namely, *Hinchcliffe v. The Earl of Kinnoul*, is of a different character, and does not apply to the question of easement reserved by implication on the grant of the quasi-servient tenement. In that case, there being two adjoining houses belonging to the same lessor, it appeared that the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the other, and it was held that a demise by the owner of both houses, of the first house with its appurtenances, carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot,—a decision which rests upon the ordinary principle of law, that if I grant a tenement for valuable consideration, I also grant a right

(k) 11 H. 7, 25, pl. 6.

(l) Pop. 166; Palm. 444; Tudor's Leading Cases in Conveyancing, 127.

of way to it through my land, if such way be necessary for the enjoyment of the tenement granted.

“ This case might have had some application to the present, if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining wharf; but it is plain that no easement can arise by the necessary operation of a grant, unless it be in the power of the grantor to give such easement. It is true that there may be two tenements, as for example, two adjoining houses, so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour, in which case the alienation of one house by the owner of both would not stop him from claiming, in respect of the house he retains, that support from the house sold which is at the same time afforded in return by the former to the latter tenement (which was the case of *Richards v. Rose (m)*); but when the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed and extinguished by the grant.

“ It must be borne in mind that I have been speaking throughout of cases where (as in the present) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both; that is, in my opinion, an ingenious but fanciful theory, which as to

one part is not required by, and as to the other part is wholly inconsistent with, the plain and simple principles of English law that regulate the effect and operation of grants of real property.

“ My decision is founded on the plain and simple rule, that the grantor, or any person claiming under him, shall not derogate from the absolute sale which he has made.”

Since the decision of *Suffield v. Brown*, a case has come before Kindersley, V.-C., in which the owner of a house sold a portion of the land adjoining, and the purchaser of the land built upon it so as to obstruct the vendor's lights. His Honor said, “ It has been determined that if a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect any buildings he pleases upon the land so sold to him, however much they may interfere with the lights of the vendor's house. This seems clearly to be the law, though it must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice” (n).

It may be remarked, in addition to Lord Westbury's comments, that a large proportion of the cases on which the decision in *Pyer v. Carter* and the opinion of Mr. Gale are founded are cases, not of an implied grant of an easement arising from the disposition of the owner of two tenements, but cases where a pre-existing easement, by reason of its necessity, remains notwithstanding the unity of possession. In more modern language the equivalent doctrine and expression would be,

(n) *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355 ; 5 N. R. 458.

they are cases where an easement is created *de novo* by reason of its necessity (o).

So in *Coppy v. J. de B.* (p), it is said, "Si on ad un tenñt ove tiel gutter curreant deins le tenñt a un auter, coñt q'il purchase l'auter tenñt, le gutter remaine et est auxy necessary come ceo fuit devñt" (q).

And an anonymous case in *Jenkins' Centuries* lays down, that "after such unity and feoffments, air, light, gutters and reparations remain not extinguished; for they are necessary for the life of man, and the support of houses" (r).

And in *Sury v. Pigot* (s), it was said that a matter of necessity would not be extinguished by unity of possession.

From these cases it appears that certain easements are in the eye of the law so necessary to the quasi-dominant tenement that they will be created *de novo* by an implied grant on the separation of it from the quasi-servient tenement. The principal, if not the only, instance of an easement at the present day held to be so created *de novo* is that of a way of necessity. Light

(o) *Pearson v. Spencer*, 1 Best & Sm. 571; 3 Best & Sm. 761.

(p) 11 H. 7, 25, pl. 6.

(q) Of course the easement might be actually destroyed during the unity of ownership, and then would not arise *de novo*. "Si un ad un stream de water, que curge en un leaden pipe, la s'il purchase le terre ou le pipe est, et ceo succide et destroy, le watercourse est extinct, quia per ceo il declare son intent et purpose, qu'il ne voit eux enjoyer ensemble, viz., le watercourse et le terre." *Lady Brown's Case*, cited in *Sury v. Pigot*, most fully in Palm. 446.

(r) *Jenkins' Centuries* 260, Century 6; Case, 57.

(s) Palm. 444; Pop. 166; 3 Bul. 329; Noy. 84; Salk. 153; W. Jones, 145; Tudor's Cases in Conveyancing, 127. The so called easement was a running stream of water which is now recognized to be a natural right of property.

is mentioned in the case cited from Jenkins as an easement of this class. But the necessity required in modern times for the creation *de novo* of such an easement is of the most stringent character; and it would probably be held that a man could never in any case be left so devoid of the access of light as to require an implied re-grant of it to him, for in the worst case he would have access to the light falling vertically upon his tenement(*t*). And this species of implied grant need not be enumerated among those by which the right to window lights can be acquired.

There is another class of cases which it will be well to distinguish, those in which it has been decided that the owner of a house parting with the land or house adjoining does not lose his right of support for the house retained. This has been laid down in *Richards v. Rose* (*u*), where the owner of two houses built at the same time parted with one of them; and in *Murchie v. Black* (*x*), where a man sold land adjoining to a house of his own. In the latter case, the Court of Common Pleas decided, that, on the terms of the agreement, the right of support from the land sold was lost; but Erle, C. J., in delivering judgment, said, "Had there been nothing more than a simple conveyance to the defendant, the vendor would no doubt have been entitled to the lateral support of No. 6 (the lot sold) for his own house."

In *Richards v. Rose* the court treated the case as one of absolute necessity. But it is submitted that the

(*t*) The cases of the owner of one story would be an exception, but one so rare as to fall within the maxim "De minimis non curat lex."

(*u*) 9 Ex. 218.

(*x*) 11 Jur. N. S. 608.

case is not one of an easement, but one of natural right of support for the soil, which has been repeatedly decided not to be lost, even when the owner of the surface has parted with a lower stratum of soil (*y*).

Nor is this right affected by the character of the surface, the owner of Snowdon or Skiddaw is as much entitled to support for his soil as an owner of land in Romney Marsh. Now it is a maxim of English law, that whatever is affixed to the soil becomes, in contemplation of law, a part of it (*z*). Therefore, if a man were to throw up an artificial mountain, or raise houses to any height upon his land, in the contemplation of law they would be part of the land itself. It is true, that he could not impose upon the owner of the adjoining land the burden of the additional support required, until a right thereto was acquired by prescription or implied grant (*a*). But if the owner of the adjoining soil be himself the person erecting the mound or building which throws upon it the burden of additional support, there is then no person to object to such

(*y*) *Dugdale v. Robertson*, 3 K. & J. 695; *Smart v. Morton*, 5 Ell. & Bl. 80; *Caledonian Railway Company v. Sprot*, 2 Macq. 449. In this case the House of Lords intimated that the same result would follow on the demise of the lower story of a house, reserving the upper story.

(*z*) "Quicquid plantatur solo, solo cedit." — Wentworth's Office of an Executor, 14th edit. p. 145. For the explanation of this maxim, vide Broom's Legal Maxims, 3rd edit. p. 387. So in the Roman Law, "omne quod solo inædificatur, solo cedit."—Inst. II., Tit. I. 29.

(*a*) *Wilde v. Minsterley*, 2 Roll. Abr. 565; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220. Such a right does not come within the Prescription Act, 2 & 3 Will. IV. c. 71, but can only be acquired by the modes known to the common law. *Bonomi v. Backhouse*, E. B. & E. 622; Dom. Proc. 7 Jur., N. S. 809.

additional burdens, and the new erections will at once become part of the land, and be invested with the ordinary legal rights thereof, one of which is the right to support. And these ordinary legal rights will of course remain on any severance of the property, except excluded or varied by agreement.

On the same principle rests the case of *Robins v. Barnes* (b), which is one of the cases cited by Mr. Gale as supporting his opinion on this question. It is there said, "If A. is seised in fee of a house which hath certain windows by prescription, and B. hath another house close adjoining to that, and B. tortiously erect a structure on his own frank tenement which overhangs the house of A. and thereby stops his light, and, after, B. purchase in fee the house of A., and afterwards grant by lease to C. the house which was the house of A., C. has no remedy to abate this nuisance;" and in another report of the same case (c), it is stated that the court agreed, "That though one of the houses had been built overhanging the other wrongfully before they came into one hand, yet after, when they came both into the hand of Allen, that wrong was now purged, so that if the houses came afterwards into several hands, yet neither party could complain of a wrong before." The first part of the decision is perfectly clear, that the grantee of the house could not claim an easement not enjoyed by the house at the time of his purchase. The second is to the effect, that on the purchase by the owner of the overhanging house of the tenement which it overhung, and whose

(b) 1 Roll. Abr. 936. Extinguishment, D. pl. 7.

(c) Hobart, 181.

rights it thereby infringed, the house became as against all the world part of the land, and its overhanging position was therefore no injury to any man in the eye of the law.

The other branch of cases in which the right to window lights arises by implied grant, is that in which the owner of two tenements, one of which enjoys a quasi-easement over the other, disposes of them simultaneously without any valuable consideration to two different persons, either by his will or by a voluntary conveyance. In this case the quasi-dominant tenement will retain its easement, or rather a similar easement will be created *de novo* in its favour, provided that such easement be continuous and apparent (*d*). For here we really have the case which the French law, by a fiction, presumes to exist in every case of the severance of two such tenements, that of the owner of an entire heritage imposing upon the different portions of his estate mutual services and obligations, which he intends to accompany such portions when divided among the different objects of his bounty. The doctrine of a grantor not being able to derogate from his grant does not affect these cases, as here all that each donee takes is from the free bounty of the donor, and this bounty is to be measured by his intentions either expressed or presumed in the absence of expression.

In the case of *Polden v. Bastard* (*e*), where two

(*d*) *Apparent* would no doubt be held to mean that which is apparent upon a careful inspection by a person ordinarily conversant with such matters. Vide *Pyer v. Carter*, 1 H. & N. 922; Gale on Easements, 3rd edit. p. 85.

(*e*) 4 Best & Sm. 258.



tenements had been severed by will, the Court of Queen's Bench decided that a discontinuous easement would not pass with one of such tenements, unless words were used in the will expressly creating the easement *de novo*. But Blackburn, J., said, "If with this cottage there had been enjoyed a continuous easement, then, by what is called the law of the disposition of two tenements, an easement would have passed at the time of the severance." And in *Pearson v. Spencer* (*f*), where two properties had been devised to different devisees, the same judge said, "We do not think that, on the severance of two tenements, any right to use ways, which during the unity of possession have been used and enjoyed in part, passes to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create the right to use those ways *de novo*. We agree with what is said in *Worthington v. Gimson* (*g*), that in this respect there is difference between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way. *Pheysey v. Vicary* (*h*) is an authority that the same rule, in this respect, applies to a will as to a deed."

In this respect the Roman law resembled our own ; for although as a rule it allowed no servitude to be retained by the vendor except specifically reserved (*i*), yet when two properties were devised to different de-

(*f*) 1 Best & Sm. 571.

(*g*) 2 El. & El. 618 ; 29 Law J. Rep., N. S., Q. B. 116.

(*h*) 16 M. & W. 484.

(*i*) Quidquid venditor, servitutis nomine, sibi recipere vult, nominatim recipi oportet. Dig. viii. 4, 10.

visees, continuous quasi servitudes seem to have continued to exist (*k*).

As in this branch of cases the implied grant of the easement does really arise from the implied intention of the owner of the two properties, it is proposed to apply and confine to this branch the name of "disposition of the owner of two tenements," given by Mr. Gale to all the cases of implied grant contained in this section.

Perhaps the implied intention of the previous owner may not have been without weight in the decisions cited previously, that on a sale simultaneous, or nearly, so, of two tenements, the quasi easements which the one enjoys and to which the other is liable are converted into legal easements. For, without the aid of some such principle, it would seem that the right of the purchaser of the quasi servient tenement to take it discharged from such liability is as strong as that of the purchaser of the quasi dominant tenement to have the advantage of such enjoyment.

Previously to the framing of the Prescription Act, the number of cases of the acquisition of the right to window lights by implied grant was much larger, for until that time, in all cases in which easements were gained by occupancy, they were considered, by a fiction

(*k*) *Binas quis ædes habebat unâ contignatione tectas : utrasque diversis legavit : Dixi, quia magis placet tignum posse duorum esse, ita ut certas partes cujusque sint contignationis, ex regione cujusque domini fore tigna : nec ullam invicem habituros actionem, jus non esse immissum habere.*—Dig. viii. 2, 36. A curious rule is laid down as to the case where one house is given to a legatee, the other to the heir ; the heir may raise his house to the detriment of the lights of the other house, but must leave it light enough for daily use. Dig. viii. 2, 10.

of law, as acquired by implied grant. Mr. Gale, indeed, still considers the acquisition by occupancy as a branch of the acquisition by implied grant. Since the passing of the Prescription Act, however, this is no longer so, for the right to window lights is now a matter *juris positivi*, depending on positive enactment; and does not require, and ought not to be rested on, any fiction of an implied grant (*l*).

(*l*) *Tapling v. Jones*, 11 H. L. Cas. 290; 34 Law J. Rep., N. S., C. P. 342.

## CHAPTER III.

## OF THE EXTENT OF THE RIGHT.

THE next subject for our consideration is the extent of the right to window lights, that is, the extent to which the owner of the land adjoining to the dominant tenement is restrained in the use thereof. The general rule is clear. The owner of the servient tenement must not make any such use thereof as will cause a sensible diminution of the value of the dominant tenement by the obstruction of the access to it of light and air, to such a degree as to interfere with the comfort of the dwellers in the house in the ordinary occupations of life, or with the beneficial use of the premises for the purposes of business. But if there be no obstruction to this extent of light and air, he is at liberty to make what use he pleases of his land, even though some obstruction of the access of light and air to the dominant tenement be occasioned thereby.

This rule is supported and explained by numerous authorities. In *Back v. Stacey* (a), Best, C. J., said, "It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action and sustain the issue,

(a) 2 C. &amp; P. 465.

there must be a sensible privation of light sufficient to render the occupation of the house uncomfortable, *and* to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. It might be difficult to draw the line, but the jury must distinguish between a partial inconvenience, and a real injury to the plaintiff in the enjoyment of the premises."

In one of the most recent cases on the subject, the rule here laid down is recognized and approved of by Wood, V. C., with one verbal correction.

"First of all," said his Honor, "it is necessary to ascertain what it is that will at law support a claim for damages in respect of an injury done to a building by the obstruction of light and air; and the authority to which I would refer, in preference to any other, upon this subject, is the summing up of Chief Justice Best in the case of *Back v. Stacey*, because that summing up has been approved of by the Lords Justices in a recent case before their Lordships. The Chief Justice told the jury, 'In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, *and* to prevent the plaintiff from carrying on his accustomed business as beneficially as he had formerly done.' With the single exception of reading *or* for *and*, I apprehend that the above statement correctly lays down the doctrine in the manner in which it would now be supported in an action at law" (b).

In *Wells v. Ody* (c), Parke, B., said "A man can

(b) *Dent v. The Auction Mart Company*, L. R., 2 Eq. 245 ; 35 Law J. Rep., N. S., Ch. 560.

(c) 7 C. & P. 410.

bring no action for the loss of a look out or a prospect, but he may do so if the light and air which would come to his windows are diminished so as sensibly to diminish the value of his premises for occupation. The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation?"

So in *Parker v. Smith* (d), Tindal, C. J., said, "It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognises is, such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business."

In *Pringle v. Wernham* (e), Lord Denman's direction to the jury was, "The first question is, whether, in consequence of this building of the defendant's, the plaintiff has less light than before to so considerable a degree as to injure the plaintiff's property in point of value. To sustain this action there must have been a considerable diminution of light, and the merely taking off a ray or two will not be sufficient."

And in *Embrey v. Owen* (f), Parke, B., in delivering the judgment of the court, after deciding that in that case the defendant had not infringed the plaintiff's rights by consuming the water of a stream to a moderate extent, continued, "The same law will be found to be applicable to air and light. These also are bestowed by providence for the common benefit of man, and so long as the reasonable use by one man of this common

(d) 5 C. & P. 488.

(e) 7 C. & P. 377.

(f) 6 Ex. 353.

property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling, and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys: but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment of all."

In an earlier case, Sir Thomas Plumer, M. R., said, "The plaintiffs have not stated precisely the injury to be experienced from the building of the defendants. Some windows, I must suppose, will be obscured; but will the effect be prejudicial to the comfort of those residing in the house? It is said that the building will be injurious to the house; but not that in the interval before the trial the comfort of those dwelling there will be affected." His Honor consequently declined to interfere by injunction (*g*).

In a recent case before Lord Cranworth, C., which was one of obstruction to the window lights of a private residence, his Lordship considered, "That what the plaintiff was bound to show was, that the buildings of the defendant caused such an obstruction of light as to interfere with the ordinary occupations of life. The real question was, whether the light was so obstructed as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life" (*h*). It would seem that, unless a very liberal construction be put on these expressions, they tend to narrow the extent of comfort from interference with which by the obstruc-

(*g*) *Wyntanley v. Lee*, 2 Swan. 338.

(*h*) *Clarke v. Clark*, L. R., 1 Ch. 20; 35 Law J. Rep., N. S., Ch. 153.

tion of light and air the occupiers of private residences enjoying a right to window lights have hitherto been protected. And it may be remarked that throughout the case his Lordship seems to have regarded the claim in this instance to the right with disapproval.

The question of what is such an interference with a person's comfort as to be an infringement of his legal right was carefully considered by Knight Bruce, V. C., in the case of *Walter v. Selfe* (i). That case was one of the pollution of air by brick-burning and the production of vapours in the process. The Vice-Chancellor said, "The question then arises, whether this is or will be an inconvenience to the occupier of the plaintiff's house as occupier of it,—a question which must, I think, be answered in the affirmative; though, whether to the extent of being noxious to human health, to animal health, or to vegetable health, I do not say nor deem it necessary to intimate an opinion; for it is with a private not a public nuisance that the defendant is charged. And both on principle and authority the important point next for decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.

"And I am of opinion that this point is against the defendant. As far as the human frame, in an average

(i) 4 De G. & Sm. 322.



state of health at least, is concerned, mere insalubrity, mere unwholesomeness, may possibly, as I have said, be out of the case; but the same may possibly be asserted of stied hogs, melting tallow, and other such inventions less sweet than useful. That does not decide the dispute; a smell may be sickening, though not in a medical sense. Ingredients may, I believe, be mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely. A man's body may be in a state of chronic discomfort, still retaining its health, and perhaps even suffer more annoyance from nauseous or fetid air from being in a hale condition. Nor, I repeat, do I think it incumbent on the plaintiffs to establish, that vegetable life or vegetable health, either universally or in particular instances, is noxiously affected by the contact of vapours and floating substances proceeding from burning bricks; for, as I have said, they have I think established, that the defendant's intended proceeding will if prosecuted abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age, whatever their state of health."

It is conceived that these observations will, *mutatis mutandis*, equally apply to the question what is such interference with the access of light and air to our neighbour's windows as to infringe his right to window lights by diminishing the comfort of the dwellers in his house. It is true that the right, the question of the infringement of which the Vice-Chancellor was then discussing, was a natural right to property; while the right to window lights is an acquired right. But this

difference applies to the origin of the rights, not to the quality of the respective rights when they have been called into existence.

It is to be remembered that in the eye of the law it is the diminution of the value of the dominant tenement caused by the interference with the comfort of its inmates, and not the loss of the personal comfort of the inmates, that entitles the owner to his remedy (*j*).

Two very important questions have been of late raised with regard to the extent of the right to window lights; the one relating to the comfort of the inmates of the dominant tenement, the other to the use of that tenement for business purposes; and neither of these can yet be considered as quite satisfactorily settled.

The first question is, "Is there any difference in the amount of light and comfort to which the owner of a tenement in the country having a right to window lights is entitled, and that to which the owner of a tenement situate in a town having a similar right is entitled?"

No such difference was suggested until the recent case of *Clarke v. Clark* (*k*), before Lord Cranworth, C. There the plaintiff's house, for obstruction to the windows of which he filed his bill, was in the town of Bristol. The Chancellor, in delivering judgment, said, "The question is, whether there has been such a material interference with the light and air reaching the plaintiff's house as to cause material annoyance to those who occupy it. Questions on this subject are questions of degree, and are therefore very difficult to deal with. All that can be done is to

(*j*) Vide *Wilson v. Townsend*, 1 Dr. & Sm. 324.

(*k*) L. R., 1 Ch. 16; 35 Law J. Rep., N. S., Ch. 151.

attend to the special facts in every case as it arises, and then to form an opinion as to whether the obstruction complained of is such as to deprive the complaining party of such a supply of light and air as he might reasonably calculate on enjoying.

“It is impossible to treat these as mere abstract questions. Much must turn on the nature and locality of the windows, the supply of light to which has been interfered with. Persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country. The steady spread of buildings in and round large towns gradually but surely obstructs some of the light and air which the houses in the interior of the place formerly enjoyed. And in estimating the damage, if any, occasioned to this plaintiff, we must not omit the consideration that the place in which he complains of obstruction to light and air is a large and populous city.”

In *Durell v. Pritchard* (l), Turner, L. J., said, “I fully agree in the observations of the Lord Chancellor in the late case of *Clarke v. Clark*.” And in *Robson v. Whittingham* (m), the same judge said, “I must say for myself I am entirely satisfied with the Lord Chancellor’s judgment in the case of *Clarke v. Clark*. I think these cases had been carried too far before the decision in *Clarke v. Clark* was pronounced.”

This concurrence of authority in favour of there being a distinction between houses in town and houses

(l) L. R., 1 Ch. 251 ; 35 Law J. Rep., N. S., Ch. 226.

(m) 35 Law J. Rep., N. S., Ch. 228.

in the country, as to the extent of the right of a dominant tenement to window lights, is very strong. But in the subsequent case of *Yates v. Jack*(*n*), Lord Cranworth, while regretting the effect of the abolition of local customs in derogation of this right, yet treated the right as being now, by the express enactment of the legislature, placed on the same footing in all localities, and decided the case without reference to the distinction drawn by him in *Clarke v. Clark*. His Lordship's words in this case were, "I cannot part with this case without saying that I have come to the conclusion at which I have arrived with great reluctance. It was stated at the bar, and I believe correctly stated, that up to the passing of the act 2 & 3 Will. 4, c. 71, there was a local custom in the city of London, according to which the owner of a house in any street was permitted to raise it to whatever height he might think fit. All such local customs were abolished by the act I have alluded to. I suppose, therefore, that the legislature thought the custom to be one which was productive of inconvenience. But considering that, assuming the existence of a custom, all persons who were owners of houses in narrow streets must have known when they purchased them to what liabilities they were exposed from the buildings of their opposite neighbours, I cannot but think the advantages derived from the custom probably exceeded its evils. The growing necessity for lofty buildings is shown by the great multiplication of them in all parts of the metropolis; and I cannot but fear that serious inconvenience may be felt by the abolition of the alleged custom,

(*n*) L. R., 1 Ch. 299 ; 35 Law J. Rep., N. S., Ch. 544.

assuming that I am correctly informed as to its existence prior to the statute. With all this, however, sitting here to administer the law, I have no concern."

In a previous case Wood, V. C., had used expressions of much the same purport, both as regarded the law then in force and the desirability of a change. He expressed his sense of difficulty in dealing with these cases in a large and improving town like the metropolis. He said that it was a question well deserving the consideration of the legislature, whether there could not be some general act passed, by which arrangements could be made, and adjustments entered into, either through the medium of a jury or otherwise, for the purpose of enabling such improvements as were stopped by suits of this nature to be carried on. But until that was done, he could not allow even improvements to be made at the expense of others. He could not take away the light and air which the legislature had made the positive property of those in the possession of these easements (o).

(o) *Stokes v. The City Offices Company*, 11 Jur., N. S. 560. It may be remarked on the opinions expressed in these two cases by Lord Cranworth and Vice-Chancellor Wood, that even were the local customs of the city of London in this behalf restored, or an enactment framed to permit improvements to be made and lofty buildings to be erected in populous places irrespective of the detriment thereby occasioned to rights to light and air, these improvements would be made at the expense of others. It could hardly be considered a public advantage to encourage the erection of new buildings which should render old buildings useless. And these new buildings would, of course, be liable to be rendered useless in their turn. The result might possibly be, a town of magnificent buildings in such proximity to each other that half the rooms in each should be unfit for purposes of business or habitation. Under the present law, the designer of such improvements can purchase the right of making them from the adjoining owner with

In the very recent case of *Dent v. The Auction Mart Company* (p), Wood, V. C., elaborately considered the effect of the preceding decisions on this point.

He said: "Another difficulty which existed at the time when I heard this case has to my mind been removed by the recent decision in *Yates v. Juck*, namely, a suggestion in the previous case of *Clarke v. Clark*, whereby the Lord Chancellor appeared to indicate that there was some difference between the right to protection of a person residing in a town, and the right of a person residing in the country, who would have reason to expect a greater amount of light in his dwelling. I confess it always appeared to me there must have been some misapprehension of the view in which these observations were put forward by the Lord Chancellor, and I should not have felt much embarrassed by them (for they could have been explained), but for an apparent acquiescence in the same view on the part of Lord Justice Knight Bruce, in *Robson v. Whittingham*. But I cannot suppose the Lord Chancellor or the Lord Justice to mean, that in reality there is any difference between the right which a plaintiff has to seek the protection of this court when he lives in a town, and

whose window lights they will interfere. And so long as it is worth the improver's while to pay the owner of the dominant tenement a sufficient compensation for the loss of his easement, such improvements will be made. If it be not worth his while to pay this price, the improvements can hardly be considered a public gain. The misfortune is, that up to the present time there are hardly any instances of dealing with such rights by purchase and sale, and precedents for so doing are wanting. In the Appendix to this Treatise it is attempted to do something towards remedying this deficiency.

(p) L. R., 2 Eq. 248 ; 35 Law J. Rep., N. S., Eq. 562.

that which he would have if he resided in the country. In the first place, obstruction of light rarely occurs in the country; towns are the places where light is wanted. The Romans, who were very accurate in their description of this subject, divided servitudes into 'rural' and 'town' servitudes; and appropriated to the division of town servitudes the case *non altius tollendi*, which was considered to be a servitude which would be most likely to occur in a town residence; rarely, if ever, in the country (q). Further than that, I may refer to the recent decision in *Tipping v. The St. Helen's Smelting Company (Limited)* (r), where it was distinctly held, that the being subjected to a large amount of nuisance already is not a reason why one should suffer more; so that, if a man can point out an additional chimney which adds to his grievance, he has a right to interfere with the grievance so increased. There is the farther observation to be made, which I see the Lord Chancellor has referred to in *Yates v. Jack*, that the legislature of late years appears to have taken a completely opposite view; because, whereas there existed by the custom of London a right to build on the site of an ancient messuage or toft, wholly irrespective of any rights that might be acquired by the neighbours, that right was abolished by the Prescription Act. That

(q) This argument is perhaps not altogether satisfactory. The distinction between *servitutes prædiorum urbanorum*, and *servitutes prædiorum rusticorum*, though no doubt it arose from the one kind being more common in the country, the other in the town, soon lost all traces of its origin; and servitudes were said to be of the former class when they affected the soil itself, of the latter class when they affected the *superfoies*—that is, anything raised upon the soil.—Inst. II., Tit. III. Sandars' edition.

(r) 4 Best & S. 608, 616; House of Lords, July 5, 1865.

must have been done on deliberation, as it was decided in *The Salters' Company v. Jay* (s), and *Truscott v. The Merchant Tailors' Company* (t), that the words, 'any local custom notwithstanding,' must have reference to the customs that existed in York and London; and therefore the legislature must be taken to have thought it unreasonable, even in towns, to continue a privilege of that description. That being so, I confess I should have felt more difficulty than I do now, had it not been for the recent decision in *Yates v. Jack*, which puts it beyond all doubt that the Lord Chancellor did not entertain the view which his observations in *Clarke v. Clark* were supposed to imply. The Lord Chancellor in *Yates v. Jack*, having regard to this provision of the legislature, and interfering as he did with reluctance, and doubting whether the custom was not better than the law as it now stands, nevertheless said that 'he had nothing to do but to follow the provisions of the legislature, and in acting upon these he held that a house raised fifty per cent. in height at a distance of thirty feet from the house of the plaintiff was a nuisance within the purview of this court, from which the plaintiff, as owner of the house, must be protected.' His Honor said that, as it appeared to him, he had overcome the difficulty of the property being in a town and not in the country; and decided the case on this footing.

With this decision concurs that of Stuart, V. C., in *Lyon v. Dillimore* (u). The Vice-Chancellor's words in that case were, "With respect to what has been said

(s) 3 Q. B. 109.

(t) 11 Ex. 855.

(u) 14 W. R. 511.



with regard to quantum of injury, no doubt the question is embarrassed by some dicta referred to in the argument, or rather by the construction which has, perhaps, been unfortunately put upon them, and which might seem to indicate that there is one rule for the enjoyment of light and air for great towns, and another for country places—that because a man in a town usually has less light and air than a man in the country, that small amount of the property he enjoys may be more readily invaded. But this result, I am sure, was never intended or even contemplated.”

And in *Martin v. Headon* (v), Kindersley, V. C., after referring to the cases on this point, and lastly to that of *Dent v. The Auction Mart Company*, concluded, “The Vice-Chancellor in his judgment goes fully into these cases, and considers that the Lord Chancellor, in *Yates v. Jack*, though not expressly repudiating the doctrine, has yet expressed opinions inconsistent with it; and Vice-Chancellor Wood concludes, and I agree with him, that any apprehension as to the effect of the prior decisions is now removed, and that we need have no idea as to any difference between the cases in populous towns and the country.”

The result of these decisions appears to be, that the extent of the right to window lights is the same, whether the dominant tenement to which the right is attached be situate in a town or in the country; and that the expressions of Lord Cranworth in *Clarke v. Clark* must be considered as expressing the ordinary fact, not as laying down a rule of law.

The second question arises with regard to the extent

(v) 35 Law J. Rep., N. S., Eq. 604 ; L. R., 2 Eq. 430.

of the right to window lights possessed by tenements used for purposes of business. It is, "Is the extent of light and air, to the unimpeded access of which the dominant tenement is entitled, to be confined to the extent sufficient for the use to which the tenement is applied for the time being, or to be enlarged to the extent sufficient for any use to which it may at any time be put?" This question has not yet been satisfactorily decided, and there are on this point decisions of the highest living authorities at direct variance with one another.

A similar point with regard to houses occupied for the ordinary purposes of life is mentioned in *Luttrell's Case* (v). "If a man has an old window to his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house."

In *Back v. Stacey* (w), Best, C. J., said, "It was not sufficient to constitute an illegal obstruction, that the plaintiff's warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied."

The point does not seem to have been adverted to in any other case, until *Jackson v. The Duke of Newcastle* (x) was decided by Lord Westbury, C. In delivering judgment in that case, his Lordship said, "I cannot say that the abridgment of the light will, to such a material extent, detract from the value of the counting-house, considered as an integral portion of

(v) 4 Rep. 87a.

(w) 2 C. & P. 465,

(x) 33 Law J., N. S., Ch. 698 ; 4 N. R. 448.

the premises, as materially to affect the suitability of those premises for the purposes to which they are now applied. But then I am sensible that it is quite possible that premises in that situation may hereafter be applied to another purpose, and made applicable to a different business, in which the proposed abridgment of light and air will operate most materially to the prejudice of the owners of these premises, and may interfere to a considerable degree with their valuable application and adaptation to some future business different from that which is now carried on there. The question, then, that I have to determine is this, whether I can interfere by way of injunction, when that injunction will be founded, not upon the extent of present injury requiring that interference, but upon an injury which, having regard to a possible future destination of the premises, may materially affect their value. I cannot find that the question has been anywhere decided. I cannot find that it has been in any authority adverted to. The ground of the jurisdiction, when stated, is always stated with this accompaniment, that it must be an injury for which damages at law can be obtained. If I regard the injury for which damages at law can be obtained, it would be the injury done simply to the counting-house by the proposed diminution of light—a diminution which I believe would leave the light quite sufficient for all the purposes to which the room is now applied. It is perfectly true that these premises, when they cease to be a grocer's shop, may be converted into a jeweller's shop, where the sunshine and the light at the back of the premises, received through the window of the counting-house, may be of the greatest possible value for the conduct of that business; or they may be

applied for a silk-mercier's shop, where the requisite quantity of light for the purpose of distinguishing colours, and the shades and hues of colour, may be of the greatest importance. The obstruction, therefore, may injure the premises possibly hereafter; but the obstruction at the present time does not injure the premises to such an extent as, having regard to the rules which I have extracted and adverted to, would warrant the interference of the court by way of injunction."

The Lord Chancellor dissolved the injunction which had been granted by the Master of the Rolls, saying, "I have had considerable difficulty in arriving at this conclusion, which certainly I am aware may stop short, in point of the exercise of jurisdiction, of that which the reason of the case would require, if I could find any authority to warrant me in going the length that I thought it would be reasonable to go. But I have found nothing which authorizes me to look into the possible future, or to speculate about the future condition of the premises; and I am obliged, therefore, to confine my right of interference to that which the exigency of the present circumstances justifies and renders necessary." His Lordship gave the plaintiff's counsel an opportunity of searching for an authority that would warrant him in looking to the possible future use that might be made of the premises; but they were unable to find any such authority, and the injunction was dissolved. Damages were, however, given to the plaintiff. This result is curious, for the arguments of Lord Westbury would seem to apply as strongly to a claim for damages as to a suit for injunction; especially since, as was said by Wood, V. C., in

*Dent v. The Auction Mart Company*, so far as the amount of injury is concerned, a court of equity will now interfere where substantial damages would be given at law.

In *Yates v. Jack (y)*, Lord Cranworth took the opposite view. He there said, "An attentive consideration of the evidence of the trade witnesses on the one side and on the other has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business. I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred or recognized by the statute 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have a sufficient light remaining, I should not think the defendant had established his defence unless he had shown that, for whatever purposes the plaintiffs might wish to employ the light, there would be no material interference with it." . . . "In deciding that what the defendant proposed to do would cause material injury to the plaintiffs, I am only arriving at the same conclusion at which the Vice-Chancellor arrived. But I cannot concur with him in

(y) L. R., 1 Ch. 295 ; 35 Law J. Rep., N. S., Ch. 539.

thinking that the Court ought to make any declaration narrowing or appearing to narrow the right of the plaintiffs to the quantity of light heretofore used by them for the purposes of their business."

It is remarkable that Lord Cranworth in his judgment makes no allowance whatever to the contrary previous decision of Lord Westbury in *Jackson v. The Duke of Newcastle*. From the report it would appear that that case was cited only on the part of the plaintiffs, who would naturally not have called his Lordship's attention to that portion of it adverse to their own contention.

This portion also of the judgment in *Yates v. Jack* was commented on and approved by Wood, V.-C., in *Dent v. The Auction Mart Company* (z). "Further than that," observed the Vice-Chancellor, "he (Lord Cranworth) says, (which, perhaps, if I may be allowed to say so, is going a little beyond what, so far as I am aware, any previous case has decided,) that the plaintiffs' right to an injunction does not depend on the obstruction being injurious to them in the trade for which they naturally used the premises, but is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Now that observation certainly goes further than any case has gone since it was decided in *Martin v. Goble* (a), that property which had been used for a malt-house would not claim the same privilege as if it had been used for a dwelling-house. But the two authorities may be easily reconciled by saying that the Lord Chan-

(z) L. R. 2 Eq. 249; 35 Law J. Rep., N. S., Ch. 563.

(a) 1 Camp. 320.

cellor's observations may apply to the user of a house as it stands for any purpose for which it may be used in that condition, not to the user of a house when its whole character has been changed, and it has been rebuilt, leaving the old windows untouched, as in the malt-house case. But the doctrine has an application to the case before me on the contested question of the sample room. Although I think upon the evidence there is very little doubt that the room in Messrs. Dent's case has been occasionally used as a sample room, the observations of the Lord Chancellor would apply to this—that if the Messrs. Dent were minded to use it as a sample room, it is immaterial whether they have been so using it for the last several years or not.” In this case *Jackson v. The Duke of Newcastle* was cited by the defendant's counsel.

There is here a conflict of judicial opinion; and in this state of the authorities it is not possible to say with certainty which view the courts will take, when the question again comes before them for decision. But it is conceived that probably the rule adopted will be, that the right to window lights extends not only to light and air sufficient for the purposes for which the dominant tenement is for the time being employed, but to light and air sufficient for any purposes for which it may reasonably be employed. It will be observed that Lord Westbury's decision was given with considerable hesitation and reluctance, and that, though declining to continue the injunction, he yet awarded damages to the plaintiffs. The decisions of Lord Cranworth and Vice-Chancellor Wood, on the other hand, were given without any expressed doubt or

hesitation. Besides, the case of *Tapling v. Jones* (b) was decided in the House of Lords in the interval between *Jackson v. The Duke of Newcastle* and *Yates v. Jack*. In this judgment of the highest court of appeal, the principle, that the right to window lights consists in a restraint in the use of his land by the owner of the servient tenement, was brought more prominently forward than in any previous case. And it would seem more natural and more consistent with the course of law that such a restraint, when once imposed, should be of a certain definite extent, and not fluctuate according to the employment for the time being of the dominant tenement, and be suddenly enlarged by the conversion of a grocer's shop into a silk merchant's sample room, or suddenly diminished by the converse change. It might naturally be expected that to cause a change in the right or the restraint an equal lapse of time would be required with that which was necessary first to confer or impose them; but in no case has it been suggested that the business for the purposes of which the dominant tenement is entitled to light and air is one a twenty years' practice of which must be shown.

In the remarks above cited of Wood, V. C., in *Dent v. The Auction Mart Company*, he states "that the Lord Chancellor's observations might apply to the user of a house as it stands for any purpose to which it might be applied in that condition, not to the user of a house when its whole character has been changed, and it has been rebuilt." The cases thus alluded to are those of *Martin v. Goble* (c) and *Garritt v. Sharpe* (d).

(b) 11 H. L. Cas. 290; 34 Law J. Rep., N. S., C. P. 342.

(c) 1 Camp. 320.

(d) 3 Ad. & E. 325.



In *Martin v. Goble*, a malt-house had been converted into a parish workhouse, and after this alteration the defendant built a wall for the obstruction of light by which the action was brought. Macdonald, C. B., gave the following direction to the jury, "It was not enough that the windows were to a certain degree darkened by this wall, which the defendant had erected on his own ground. The house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house. The converting it from the one to the other could not affect the rights of the owners of the adjoining ground. No man could by any act of his suddenly impose a new restriction upon his neighbour. This house had for twenty years enjoyed light sufficient for a malt-house, and up to this extent and no further the plaintiffs could still require that light should be admitted to it. The question therefore was, whether, if it still remained in the condition of a malt-house, a proper degree of light for the purpose of making malt was now prevented from entering it by reason of the wall which the defendant had erected." The jury found a verdict for the defendant.

In *Garritt v. Sharpe*, the plaintiff had a barn, in the side of which adjoining the defendant's premises were apertures, by which sufficient light entered for the use of the barn. The plaintiff turned the barn into a malt-house, and cut windows where the apertures had been. The defendant erected a fence in front of the windows, and for this obstruction the action was brought. The defendant offered evidence to show that the alteration in the mode of admitting light to the plaintiff's building was injurious to the defendant; but Tindal, C. J., refused to receive such evi-

dence. On the ground of misdirection on this point, a rule for a new trial was made absolute (e).

These cases are no authority against the opinion that the owner of a dominant tenement is entitled to light sufficient for the purpose of any business for which it may be employed. In both the dominant tenements were altered, and their whole character changed; in their former state they were fit for one class of businesses, in their latter for a different class. Indeed, the remarks of Macdonald, C. B., in *Martin v. Goble*, support the opinion expressed just now, for he lays down that a new restriction cannot be suddenly imposed upon the adjoining owner, and that the light, the access of which must not be impeded, is the light which has been enjoyed for twenty years past. This coincides with the author's opinion, that the restraint imposed on the servient owner must be a definite restraint, and not fluctuate with the business for which the dominant tenement is employed.

But whatever be the final decision of the courts on this question, some restrictions, which it has been attempted to impose upon the extent of this right, seem to have been conclusively disposed of by the recent cases.

The first of these suggested restrictions is, that the owner of the dominant tenement is not entitled to the uninterrupted access of more light and air than other persons find sufficient for the same business. That no such restraint exists has been repeatedly decided (f).

(e) *Garritt v. Sharpe* goes further than this, and lays down that the alteration may be such as to destroy the right altogether; this point will be considered in the next chapter.

(f) By Wood, V. C., in *Stokes v. The City Offices Company*, and

Again, it has been contended that the provision in the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, s. 29, "That every building used or intended to be used as a dwelling-house, unless all the rooms can be lighted and ventilated from a street or alley adjoining, shall have in the rear or at the side thereof an open space exclusively belonging thereto of the extent of at least one hundred square feet," limits the amount of air to which a right can be acquired. Of this contention Wood, V.-C., disposed summarily in *Dent v. The Auction Mart Company* (g), saying, "As to air it comes to a *reductio ad absurdum*. With regard to that it was said, the Metropolitan Building Act provides that there shall not be any house or hovel, however mean, which shall not have 100 square feet of area for the purpose of ventilation, and you have twice that amount. That is to say, these gentlemen, having carried on their business for a long time, are to have their rights measured by what may be supposed to be the *minimum* to be afforded to persons who inhabit the meanest houses that can be selected for comparison."

And, lastly, where the persons entitled to the enjoyment of the light have at times lessened the amount of the light which has access to their premises, it has been argued, but without success, that they can have no right to an uninterrupted supply of more light than the quantity to which they have so limited themselves. In *Yates v. Jack* (h), Lord Cranworth, C., said, "The

*Dent v. The Auction Mart Company*; by Kindersley, V. C., in *Martin v. Headon*; and by Lord Cranworth, C., in *Yates v. Jack*, as cited by Wood, V. C., in *Dent v. The Auction Mart Company*.

(g) L. R., 2 Eq. 250.

(h) L. R., 1 Ch. 297; 35 Law Rep., N. S., Ch. 543.

evidence satisfies me that for some purposes of their (the plaintiffs') trade it is necessary at times to exclude the direct rays of the sun, and that in what is called sampling, a subdued light may be better than direct sunlight. But this is not the question. It is comparatively an easy thing to shade off a too powerful glow of sunshine, but no adequate substitute can be found for a deficient supply of daylight." And in *Dent v. The Auction Mart Company* (i), Wood, V.-C., replied to such an argument, "It is said, 'you have actually put up venetian blinds and damaged your own light.' The answer to that is obvious. The same thing occurred in *Yates v. Jack*. Every now and then when the light is too much, people pull down their blinds; but that is no reason, because they accommodate the light to their work, that they should be deprived of it at all times."

Before closing this chapter, it must be remarked that there has been some little discussion as to the meaning of the word *beneficially*, in the direction of Best, C. J., quoted above, that to give a right of action there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business on the premises as *beneficially* as he had formerly done. In the case so often referred to of *Dent v. The Auction Mart Company*, the defendant's counsel urged that the plaintiff had not ventured to say that he would lose a customer. But Wood, V.-C., said, "I may here remark that I do not read the expression, 'carrying on the business beneficially,' as

(i) L. R., 2 Eq. 251; 35 Law J. Rep., N. S., Ch. 564.

Mr. Giffard read it, as depending on the question whether or not the person carrying on the business is likely to lose a customer. I think it probable that Messrs. Pilgrim, for example, by carrying on their business by gaslight all day, would not lose a single client, but they would carry it on much less beneficially to themselves, whether in discharging their duty to their client on the one hand, or in preserving their health and their faculty of transacting business on the other" (*j*).

(*j*) L. R., 2 Eq. 246 ; 35 Law J. Rep., N. S., Ch. 560.

## CHAPTER IV.

## OF THE LOSS OF THE RIGHT.

THE modes of the loss of the right to window lights correspond to the modes of its acquisition. To the acquisition by occupancy corresponds the loss by abandonment; to the acquisition by express grant, the loss by express release; to that branch of the acquisition by implied grant arising from the disposition of the owner of two tenements, the loss by the union of the two tenements. That branch of the acquisition by implied grant arising from the grant of the quasi dominant by the owner of the quasi servient tenement is thus left without a corresponding form of loss; this must be looked for in the converse case of the grant of the quasi servient by the owner of the quasi dominant tenement, in which case, as we have seen, the quasi easement is extinguished. This subject has been previously treated in connection with the controversy whether in such cases the quasi easement is or is not extinguished, and will not be again discussed in this chapter.

## SECTION I.

*Of the Loss of the Right by Abandonment.*

The right to window lights is acquired, as was said in a former chapter, by twenty years' occupancy; since

the Prescription Act this is so, both in fact and in theory, and was so in fact before that statute, though there were many exceptions to the rule. It has always been allowed that an abandonment of the enjoyment during the same period destroys the right. Independently of any question of an intention to abandon the right, a countervailing easement would at the expiration of that period accrue to the owner of the servient tenement. "When a window has been shut up for twenty years," said Lord Ellenborough, "the case stands as though it had never existed" (a).

But a cessation of the enjoyment during a much shorter period will put an end to the right, if the intention of the owner of the dominant tenement to abandon it be manifest. "There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment" (b). And whether such an intention exists or not must be collected from all the circumstances of the case, in which time is only one element.

The point was elaborately considered in the case of *Moore v. Rawson* (c). In that case the plaintiff had an ancient house, adjoining to which there had been a building used as a weaver's shop; this shop had ancient windows. About seventeen years before the action, the then owner and occupier of the premises took down the old shop, and erected on the same site a stable, having a blank wall on the side adjoining the defendant's premises. About three years before the action, while the plaintiff's premises continued in this state, the defendant

(a) *Laurence v. Obee*, 3 Camp. 514.

(b) *Liggins v. Inge*, 7 Bing. 693.

(c) 3 B. & C. 332; 5 D. & R. 234.

erected a building next to the blank wall; the plaintiff then opened a window in that wall in the same place where there had been formerly a window in the old wall; and the action was brought for the obstruction of this window by the defendant's building. Hullock, B., directed the jury to find for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. The question was argued before the Court of King's Bench, the judges of which delivered their judgments seriatim in favour of the defendant.

Abbott, C. J., said, "It seems to me, that if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies on him at least to show, that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of these advantages within a reasonable period of time. I think the burden of showing that lies on the party who has discontinued the use of the house."

Bayley, J., said, "The right to light, air, or water, is acquired by enjoyment; and will, it seems to me, continue so long as the party either continues that enjoyment, or shows an intention to continue it. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and it is a wholesome qualification of the rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he



does some act to show that he means to resume it within a reasonable time."

And Littledale, J., said, "The right is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. If, therefore, as in this case, the party who has acquired the right once ceases to make use of the light and air which he had appropriated to his own use, without showing any intention to resume the enjoyment, he must be taken to have abandoned the right. I am of opinion, that as the right is acquired by user, it may be lost by non-user. It would be most inconvenient to hold, that the property in light and air which is acquired by occupancy, can only be lost where there has been an abandonment of the right for twenty years. I think that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much shorter period than twenty years. In this case, I think that the owner of the plaintiff's premises abandoned his right to the ancient lights, by erecting the blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under these circumstances, I think that the temporary disuse was a complete abandonment of the right."

In a later case where the question was, whether a private right of way, which was inconsistent with the public user thereof, had been released or abandoned, Platt, B., told the jury that no interruption by the public for a shorter period than twenty years would destroy the right. But the Court of Queen's Bench made a rule absolute for a new trial on the ground of

misdirection. In delivering the judgment of the court, Lord Denman, C. J., said, "The question in the cause really was the continuing existence of that private right; or, to put it in other words, whether that right, once well commenced, had been in any way released, abandoned, or destroyed. The mode in which the prosecutor contended that the right must be taken to have come to an end was, by the public user and obstruction, inconsistent, as it was said, with the assertion of the private easement; and this gave occasion to the ruling which is complained of. The learned judge appears to have told the jury that no interruption by the public for a shorter period than twenty years would destroy the right. If this was laid down as a rule of law, or even as a conclusive presumption of fact, we think in the former case it was erroneous, and in the latter would be likely to mislead the jury, as turning their attention to a definite period of time as the ground for decision, when time might in truth be wholly immaterial, or only in part material. The learned judge appears to have proceeded on the ground, that as twenty years' user in the absence of an express grant would have been necessary for the acquisition of the right, so twenty years' cesser of the use, in the absence of any express release, was necessary for its loss. But we apprehend, that as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention

in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend upon all the accompanying circumstances"(d).

In *Stokoe v. Singers*(e), the same principle was approved, though, as the evidence in that case was to the effect that the owner of the dominant tenement had not contemplated the abandonment of his right, the decision was in his favour. The facts were as follows: The plaintiff's predecessor was owner of a house in which there were ancient windows. He blocked them up; but the appearance of the premises was such that it was obvious to a spectator from without that there had formerly been windows; and it was disputed whether it would or would not appear that there were still windows there. Nineteen years after this, the defendant, having become owner of the adjoining land, showed an intention of building on it in a manner which would prevent the plaintiff from ever again opening the blocked-up windows. The plaintiff thereupon opened the windows in order to assert his right. The defendant erected a hoarding on his own land so as to obstruct these windows, and for this obstruction the action was brought. Martin, B., told the jury, that, assuming the right had existed, the question would arise whether it had ceased. He explained at considerable length that there were various ways in which

(d) *Reg. v. Chorley*, 12 Q. B. 518.

(e) 8 Ell. & Bl. 31.

the right might be lost. He stated that the right might be lost by an abandonment, and that closing the windows with the intention of never opening them again would be an abandonment destroying the right, but closing them for a mere temporary purpose would not be so. He also stated that though the person entitled to the right might not really have abandoned his right, yet, if he manifested such an appearance of having abandoned it as to induce the owner of the adjoining land to alter his position in the reasonable belief that the light was abandoned, there would be a preclusion as against him from ever claiming the right. The jury found for the plaintiff. A rule for a new trial was allowed on the ground of misdirection "in directing the jury to find for the plaintiff, unless they were satisfied that the lights referred to in the evidence had been closed with the intention of never opening them again." But the Court of Queen's Bench discharged the rule, saying, "Taking the whole summing up together, it seems to us that the true points were left by the judge to the jury, and found for the plaintiff. We consider the jury to have found that the plaintiff's predecessor did not so close up his lights as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning the right of using them."

The point was much discussed by the judges during the course of the argument. Lord Campbell, C. J., doubted whether the communication of the intention to abandon destroyed the right until the communication was acted on, when it certainly did. But Erle, J., felt inclined to say, that the intention permanently to

abandon the right to light would destroy the right as soon as communicated to the owners of the servient tenement, without the lapse of any time (*f*).

To this principle may be referred the cases of *Winter v. Brockwell* (*g*) and *Liggins v. Inge* (*h*). It has been mentioned in the third section of the second chapter, that these cases have been sometimes supposed to support the doctrine that an easement can be created at law by a parol licence. But the true deduction from them is, that a parol licence from the owner of the dominant to the owner of the servient tenement, to do something on his own premises inconsistent with the easement attached to the dominant tenement, will prevent the owner of the dominant tenement from afterwards complaining of injury by the obstruction of or interference with the easement in consequence of the act for which he has so given licence. The licence is incontrovertible evidence of the abandonment of the right, so far as it is inconsistent with the act for which the licence is given.

In *Winter v. Brockwell*, the plaintiff, who had an ancient window opening into the defendant's area, gave the defendant leave to cover the area by a skylight. After this was done, the plaintiff brought an action for stopping the access of light and air, and communicating stenches to the plaintiff's house by means of

(*f*) But no presumption will arise of the abandonment of an easement, which, like a right of way, is acquired by adverse enjoyment, from the mere fact of non-user. The non-user in this case must be the consequence of something which is adverse to the user in order that such a presumption should arise. *Ward v. Ward*, 7 Ex. 838, per Alderson, B.

(*g*) 8 East, 308.

(*h*) 7 Bing. 682.

this skylight. But Lord Ellenborough directed the jury, that the licence given by the plaintiff to erect the skylight, having been acted on by the defendant, and the expense incurred, could not be recalled and the defendant made a wrongdoer, "at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it (i)." Under this direction, the verdict was for the plaintiff, and a new trial was refused.

In *Liggins v. Inge*, the plaintiff's father had by oral licence permitted the defendants to lower the bank of a river, and make a weir therein above the plaintiff's mill. By this the amount of water that flowed to the plaintiff's mill was lessened. The plaintiff therefore required the defendant to restore the bank to its former condition, with which requisition he refused to comply. The plaintiff then brought his action; and the matter having been referred to an arbitrator, who made an award in his favour, the defendants obtained a rule to set aside the award, and the rule was made absolute. In delivering the judgment of the Court, Tindal, C. J., said, "It cannot be denied that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant as an incorporeal hereditament, and not by parol licence. We do not, however, consider the object, and still less the effect of the parol licence, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was accustomed to flow

(i) This qualification would seem to have now no application, since in *Tapling v. Jones*, 11 H. L. Cas. 323; 34 Law J. Rep., N. S., C. P. 352, Lord Chelmsford expressed his opinion that the right once lost could never be revived.

to the lower mill, but simply to be an acknowledgment on the part of the plaintiff's father that he wanted such water no longer for the purposes of his mill; and that he gave back again, and yielded up so far as he was concerned, that quantity of water which found its way over the weir, which he then consented should be erected by the defendant. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burden of restoring matters to their former state and condition. There is nothing unreasonable in holding that a right which is gained by occupancy may be lost by abandonment. Suppose a person who formerly had a mill upon a stream should pull it down, and remove the works with the intention never to return. Could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished? Or that he could be compelled to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a subject of inquiry by a jury whether he had completely abandoned the use of the stream, or left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared

his intention to abandon the stream,—that is, if he had licensed the other party to erect a mill,—the same inference must follow with greater certainty. Or suppose A. authorises B. by express licence to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to interrupt part of the light; could he afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the licence?"

In connection with the question of abandonment will best be noticed that of alteration. For in some of the cases in which it has been decided that alteration of the windows of the dominant premises gives a right to obstruct ancient lights, such ancient lights are said to be lost by abandonment; though in other cases forfeiture is said to be the cause of the loss; and in the more modern decisions to this effect, the phrase is, that the obstruction of the ancient lights is permitted only as necessary to the obstruction of the new.

Few points in the law of window lights have been the subject of more discussion and of more difference of opinion than have the questions whether the opening of additional windows, or the alteration of existing windows, by the owner of a tenement possessing the right to window lights, affects the existing right; and, if so, to what extent; and, if lost, is the right absolutely lost, or will it revive on the restoration of the tenement to its former state. It has been even contended that the privilege of ancient windows is lost by alteration or improvement of the framework and glazing, without either their size, shape, or position being altered. But this construction has been uniformly rejected by the courts (*j*).

(*j*) *Cotterell v. Griffiths*, 4 Esp. 69. The plaintiff had removed



It was also soon settled that when the alteration of the dominant tenement obviously left the servitude imposed on the other tenement unaffected or diminished, no right was lost by such an alteration (k).

The opinions on the other questions have, however, been conflicting to the last degree; but the recent decision of the House of Lords has authoritatively settled some, and has furnished a clue which, it may be hoped, will lead to a satisfactory issue out of the remainder of these difficulties. A short summary of the earlier decisions will show how conflicting and confusing had been the judicial opinions expressed on this subject.

In *Cherrington v. Abney* (l), the bill was for an injunction to prevent stopping of lights; there being but six lights in an old house; it was insisted, "that in the new they should have but the same number of

blinds fitted to his ancient windows which prevented his seeing into the defendant's garden. *Turner v. Spooner*, 1 Dr. & Sm. 478. "If the owner makes alterations merely in the framework or glazing of his window, not altering the position or the size of the aperture in the building, he has a right to do so without losing his privilege."—Per Kindersley, V. C. *Jackson v. Duke of Newcastle*, 33 Law J. Rep., N. S., Ch. 702; 4 N. R. 450. "The words *ancient lights*, however, do not in the smallest degree import that the window itself shall remain of the same construction and shape; for example, the windows of this court, which are the old fashioned casements, may be replaced by large sashes consisting of one piece of plate glass, and, of course, therefore, affording a much greater and more abundant supply of light, but the aperture must remain the same."—Per Lord Westbury, C.

(k) *Luttrell's Case*, 4 Rep. 87. *Saunders v. Newman*, 1 B. & Ald. 258. The plaintiff had substituted a smaller water-wheel for a larger, and it was held, that as this did not prejudice his neighbours, he did not lose his right to have a flow of water to his mill free from obstruction. *Hall v. Swift*, 6 Scott, 167. It was held that a slight alteration of a watercourse did not destroy the right thereto.

(l) 2 Vern. 646 (1709).

lights, and of the same dimensions, and in the same place, or else may stop up and blind them.

"So must not make more stories, more lights, nor in other places."

"It is certain they cannot alter the same to the prejudice of the owner of the soil; as if before so high, as they could not look out of them into the yard, shall not make them lower and the like, for privacy is valuable."

Lord Hardwicke said, "If I should give an opinion that lengthening of windows, or making more lights in the old wall than there were formerly, should vary the rights of persons, it might create innumerable disputes in populous cities, especially in London, and therefore I do not give an absolute opinion, but I should rather think it did not vary the right" (*m*).

In *Chandler v. Thompson* (*n*), the plaintiff had enlarged an ancient window both in height and width, and put in a new frame. The defendant then erected the building complained of, which obstructed several inches of the plaintiff's old window, but still admitted more light to pass through the new window, than the plaintiff had enjoyed before the alteration. It was insisted that, under these circumstances, the action could not be maintained.

But Le Blanc, J., was of opinion that the whole of the space occupied by the old window was privileged, and that it was actionable to prevent the light and air from passing through this as it had formerly done. That part of the new window which constituted the

(*m*) *East India Company v. Vincent*, 2 Atk. 83 (1740).

(*n*) 3 Camp. 80 (1811).

enlargement might be lawfully obstructed, but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources.

In *Garritt v. Sharpe* (o), the Court of King's Bench said, a party might so alter the mode in which he had been permitted to enjoy this kind of easement, as to lose the right altogether. And in another case decided, by the same court in the same year, Pattleson, J., said, "If it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he had the greatest objection, and to which he would never have assented if it had come in question in the first instance" (p).

In the same year, in a case before the Court of Exchequer, it was argued that where a party claims an easement, he cannot vary his mode of exercising his right; that if he does so, his right ceases. But Alderson, B., said, "How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? It has been held in the

(o) 3 Ad. & El. 330 (1835).

(p) *Blanchard v. Bridges*, 4 Ad. & El. 176; 5 N. & M. 567. The case was decided on the ground that there was no grant of or consent to the access of light to the windows in question.

case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window. If the act of the defendant is injurious to the plaintiff's original right, it is not the less so because it is injurious also to a farther right which the plaintiff claims" (q).

The next case is one which, for a time, became the leading case on the subject. This was *Renshaw v. Bean* (r), argued before the Queen's Bench in 1852. In that case the plaintiff, the reversioner of a house possessing ancient windows adjoining the defendant's premises, added another story, opened windows in that story, and enlarged and otherwise altered the position of the ancient windows. The defendant subsequently rebuilt his premises, and thereby darkened all the windows on that side of the plaintiff's house, both ancient and new. Lord Campbell, C. J., in delivering the judgment of the court, said, "We are of opinion that this action is not maintainable. But we do not proceed upon the ground that the plaintiff, by the alteration in his windows, had entirely lost the right which he had before enjoyed, of having light and air through such portions of the present windows as formed portions of the ancient windows before the alteration; and we must be understood as not meaning to overturn any of the cases on which the plaintiff's counsel has relied. But the plaintiff has acquired nothing more in addition to that former right; and, if, by the alterations which he has made, he has

(q) *Thomas v. Thomas*, 2 C. M. & R. 39.

(r) 18 Q. B. 112.

exceeded the limits of that right, and has put himself into such a position that the access cannot be obstructed by the defendant in the exercise of his lawful rights on his own land without at the same time obstructing the former rights of the plaintiff, he has only himself to thank for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he shall, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right."

From the decision in *Renshaw v. Bean*, it followed that where the owner of a tenement possessing ancient lights made such alterations or additions to his old windows that the owner of the servient tenement could not obstruct the altered or added parts without also obstructing the old windows, he was at liberty so to obstruct them. It was also considered to follow from this decision, that the owner of the dominant tenement by restoring his premises to their original state would regain his former rights, and might oblige the owner of the servient tenement to remove any obstruction to the ancient windows.

In *Cawkwell v. Russell* (s), a case in which the plaintiff was entitled to use a drain for ordinary refuse water, and he used it also for foul drainage, Pollock, C. B., referred to *Renshaw v. Bean* in the following terms: "When a party has a limited right of this kind, and exercises that limited right in excess, so as to produce a nuisance, the only remedy, and the only way whereby

(s) 26 Law J. Rep., N. S., Ex. 36 (1856).

a party can protect himself, is by stopping the whole, as was done in a case deciding (though it is hardly necessary to cite a decision on the point: it is so very clear and plain on the good sense of the matter that it hardly needs an authority), that if a man has a limited right to the use of a window and he enlarges it considerably, the only way in which the person who is annoyed by the enlargement of the window can prevent that nuisance is by erecting a barrier and stopping the whole up. The party who is in that way prevented from the exercise of a limited right because he has turned it into a larger claim, has no other resource than to reduce his window to a proper size and then insist on having it, in that altered condition, tolerated in overlooking the tenements in the neighbourhood." It will be observed in this case an entirely new servitude was imposed on the servient tenement, that of receiving a flow of foul water.

In *Hutchinson v. Copestake* (*t*), the plaintiff having so altered his windows that the defendant could not obstruct the altered parts without also obstructing the ancient windows, he did so obstruct them. The Court of Common Pleas said the case was not distinguishable from *Renshaw v. Bean*, and on its authority gave judgment for the defendant. The case was taken before the Exchequer Chamber (*u*), and there affirmed. Crompton, J., based his judgment on the same grounds as *Renshaw v. Bean*. The judgment of the learned judge in this case contains the best exposition of the arguments in favour of this opinion. He,

(*t*) 8 C. B., N. S. 102 (1860).

(*u*) 9 C. B., N. S. 863 (1861).

said, " We were pressed with the argument that there was no greater amount of inconvenience to the servient tenement, and a case of *Cooper v. Hubbuck* (v) was cited where the Master of the Rolls was supposed to have held that a party having several windows in his house could put out an intermediate new window between two old ones, where no apparent detriment to the owner of the servient tenement appeared to arise therefrom. I wholly dissent from this doctrine. I think that the right to restrict the owner of the adjoining land from building on his own land, gained by user or grant, must be confined to the subject matter of such user or grant, and that the restriction on the owner of the servient tenement must be substantially the same, according to the rule laid down in *Blanchard v. Bridges* (w). I do not think that the owner of the old lights can say ' This new window I now put out will occasion you no harm, as you could not build so as to affect any of my lights before, and this new one will not abridge your power of building.' The new light is not one of the windows to which the original assent was given; and it may be that the owner of the servient tenement would not have chosen to acquiesce if the window had been in the situation of the new window.

" Suppose that a party has a back wall of his house with no windows or very few windows opposite to the front of his neighbour's house, the neighbour may very likely not object to a single window which may not annoy him by being opposite to particular parts of his

(v) 30 Beav. 160.

(w) 4 Ad. & E. 176; 5 N. & M. 567.

own house. He may be goodnatured enough not to object to two such windows, and may allow a right to be gained to them; whereas an intermediate window might have made all the difference, and might have prevented him from at all acquiescing in any rights.

“On the other doctrine, an acquiescence in one unimportant light, which gave no annoyance, might be made to operate so as to give a right to lights which might be a great annoyance and interference with the privacy of the servient tenement, in which the owner of the servient tenement never would have acquiesced. Can it be the law, that a man who has one window in the back(*x*) of his house can say to his neighbour, my one window is so situate as that any increase in your house would interfere with some rays of light falling upon it, and therefore I have a right to fill the back of my house with windows which you must not interfere with.”

This judgment was so much the most lengthy and elaborate delivered, that it has been supposed that *Renshaw v. Bean* was virtually affirmed in error on this occasion. But this was not so: the case was decided on the ground that none of the existing windows was substantially a continuation of the ancient light; and Blackburn, J., subsequently stated, that the majority of the Court of Error as constituted on that occasion were prepared, if necessary, to overrule that decision(*y*).

In *Cooper v. Hubbuck* (*z*), above referred to, the Master of the Rolls said, that in these matters he should always regard the materiality, and see whether in fact

(*x*) In the report *front*, but the context requires *back*.

(*y*) 12 C. B., N. S. 837.

(*z*) 30 Beav. 164 (1860).



the land of the person over whom the easement was obtained was in any degree prejudicially affected by the alteration made by the person entitled to the easement. The plaintiff having added an upper story to his house, his Honor said that, in accordance with *Renshaw v. Bean*, he would, if the plaintiff submitted to it, make an order on the plaintiff to restore his windows to their original state, and then grant an injunction in a mandatory form, restraining the defendant from permitting the light and air which formerly came to those windows to be interrupted. But, on account of their delay, the plaintiffs were left to their remedy at law.

In *Wilson v. Townend* (a), Kindersley, V. C., said that if he could be quite clear that the facts of the case then before him were the same as those in *Renshaw v. Bean*, he should simply follow it. In *Davies v. Marshall* (b), he laid down the rule as to the effect of additional windows upon ancient lights in the same terms in which it was stated in that case. And in *Turner v. Spooner* (c), he implied that his opinion was, that the owner of ancient lights would lose his privilege if he put in additional windows, increased the number of apertures or enlarged their size.

In *Martin v. Headon* (d), the same learned judge stated the difficulties attending the question, and in particular said he had great difficulty in understanding how an ancient light could temporarily cease to be an ancient light, and afterwards re-acquire that character without any lapse of time.

(a) 1 Dr. & Sm. 324 (1860).

(b) 1 Dr. & Sm. 557 (1861).

(c) 1 Dr. & Sm. 467 (1861).

(d) 11 Jur., N. S. 5 (1864).

In *Binches v. Pash* (e), the Court of Common Pleas held, that the right of the owner of the dominant tenement in respect of his privileged windows is not lost by the opening of unprivileged windows, though perhaps it might be so if the alterations rendered it impossible to distinguish the privileged part from the unprivileged. But that the opening of such unprivileged windows is a justification for what would otherwise be a wrong, that is, for obstructing the ancient windows, if it be necessary to do so in order to obstruct the new ones. And the court held that the defendant was not justified in proceeding to obstruct the old windows, without at the same time obstructing the new ones.

In *Weatherley v. Ross* (f), decided after the authority of *Renshaw v. Bean* was controverted, Wood, V. C., said he should adhere to that decision. His reasons for so doing coincided with those given by Crompton, J., in *Hutchinson v. Copestake*.

"I confess," said the Vice-Chancellor, "it appears to me contrary to reason and common justice to say, that if I allow a neighbour to open and establish a right to one window, I am by that single concession precluded from interfering with an unlimited series of new windows which he may afterwards think fit to open, because I find it impossible to obstruct the new lights without in some measure interfering with the right to one light which I in the first instance allowed him to acquire. So to hold would be, in effect, to entitle any person, under the pretence of wanting one window

(e) 11 C. B., N. S. 324 (1861).

(f) 1 H. & M. 349 (1862-3).

only, to obtain the privilege of restricting to any extent his neighbour's right of obstructing any new windows which he may choose to open."

But in 1865, the decision of the House of Lords in the case of *Tapling v. Jones* (g) settled the principle on which all questions of this nature must for the future be resolved. In 1857, Jones, the original plaintiff, purchased a three-storied house, with an ancient light on each story, abutting on the premises of Tapling. The plaintiff altered two of these ancient windows, leaving the third unaltered, and built two additional stories overlooking the defendant's premises. It was impossible for the defendant to obstruct the new lights without at the same time obstructing the ancient lights. The defendant then built up a wall obstructing all the lights. The case found that the new windows could not have been obstructed in a more convenient manner. The plaintiff bricked up his new windows, and restored the old to their former size and shape, and required the defendant to pull down the wall, and restore his premises to their former light and air. The defendant refused to do so. An action was brought, and a verdict taken for the plaintiff, subject to a case for the opinion of a court of law.

The case was in 1862 argued before the Court of Common Pleas (h). That court held unanimously that, as the defendant could not obstruct the new lights without at the same time obstructing the old lights, he was justified in the obstruction of all. On the further point, as to the effect of the restoration of the premises

(g) 11 H. L. Cas. 290 ; 34 Law J. Rep., N. S., C. P. 342.

(h) 11 C. B., N. S. 283, *nom. Jones v. Tapling*.

to their original state, Erle, C. J. (i), and Williams, J., held that the continuance of the obstruction, after the cause for its erection had been removed, was an unlawful act; but Byles, J., and Keating, J., held that, the obstruction being lawful at the time of its erection, the defendant was not bound to remove it on the plaintiff's restoring his premises to their former state. Keating, J., withdrew his judgment, and the case was taken to the Exchequer Chamber (j).

The Exchequer Chamber also was divided in opinion. Pollock, C. B., and Martin, B., considered that the obstruction was justifiable at first, and remained so after the restoration; Wightman, J., and Crompton, J., considered the obstruction to have been originally justifiable, but to have ceased to be so after the restoration; while Blackburn, J., and Bramwell, B., considered that it never was justifiable, and denied *Renshaw v. Bean* to be law. The judgment of the court below was accordingly affirmed. The defendant appealed to the House of Lords, who, without hearing counsel for the plaintiff below, affirmed the decision of the Exchequer Chamber (k). The judgments delivered by the Lords on this occasion are the most valuable existing authorities on all questions connected with this branch of the subject, and are accordingly given at some length.

"Before dealing with the present appeal," said Lord Westbury, C., "it may be useful to point out some expressions which are to be found in the decided cases,

(i) Who repudiated the idea that the light was forfeited by the attempt at encroachment.

(j) 12 C. B., N. S. 826, *nom. Jones v. Tapling*.

(k) 11 H. L. Ca. 290; 34 Law J. Rep., N. S., C. P. 342.

and which seem to have a tendency to mislead; one of these expressions is the phrase 'right to obstruct.' If my adjoining neighbour builds upon his land, and opens numerous windows which look over my gardens or my pleasure grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

"Again, there is another form of words which is often found in the cases on this subject, namely, the phrase, 'invasion of privacy by opening windows.' That is not treated by the law as a wrong for which any remedy is given. If A. is the owner of beautiful gardens and pleasure grounds, and B. is the owner of an adjoining piece of land, B. may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A. has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory.

"If, in lieu of the words, 'the access and use of light to and for any dwelling-house,' in the third section of the statute (*l*), there be read, as there well may, 'any window of any dwelling-house,' the enactment (omitting immaterial words) will run thus: 'When any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years

(*l*) The Prescription Act.

without interruption, the right to such windows shall be absolute and indefeasible.'

"Suppose, then, that the owner of such a dwelling-house with such a window, that is, with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right thereby become defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of so building on his land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building was gone by the indefeasible right which the statute has conferred.

"Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in *Renshaw v. Bean* and *Hutchinson v. Copestake* were founded. The facts in those two cases were not exactly the same as in the present; for in neither was any ancient window preserved unaltered; but the old windows had been enlarged, and new windows added: in which state of things it was held, that inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows, and the excess beyond the ancient lights, without at the same time obstructing the original apertures, the owner of the house with these windows must be considered as having lost his right to the ancient lights, at all events until he restored his house to its original condition.

"According to these cases the law must be thus stated, namely, if the owner of a dwelling-house with ancient lights opens new windows in such a position as

that the new windows cannot be conveniently obstructed by an adjoining proprietor without at the same time obstructing the old, he, the adjoining proprietor, is entitled so to do, at all events so long as the new windows remain. Upon examining the judgments, it will be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed, and the court asks whether he can complain of the natural consequence of his own act. I think two erroneous suppositions are involved in or underlie this reasoning; first, that the act of opening the new windows was a wrongful one; and secondly, that such wrongful act is sufficient in law to deprive a party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act, and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, namely, the adjoining proprietor."

Lord Cranworth said, "Every man may open any number of windows looking over his neighbour's land; and on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if by so doing he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights, he is not committing a wrong. But

what ground is there for contending that, because his building so as to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass,—he may commit a trespass? I can discover no principle to warrant any such inference."

And Lord Chelmsford said, "By the Prescription Act, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right which so far restricts the adjoining owner in the use of his own property, that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted. . As to anything beyond, the parties possess exactly the same relative rights which they had before. The owner of the privileged window does nothing unlawful if he enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground so as to obstruct the addition to the old window, or to shut out the new one, but he does not regain his former right of obstructing the old window which he had lost by acquiescence, nor does the owner of the old window lose his former absolute and indefeasible right to it, which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

"It must always be borne in mind that it is no unlawful act for the owner of a house to open a new window, or



to enlarge an ancient window, although in the latter case some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises, without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of forfeiture to hold that the owner of an ancient window, doing nothing but what he may lawfully do, loses his existing right, because it stands in the way of the means of interfering with an act against which the owner of the adjoining land would otherwise have been able, and would have been entitled to defend his property."

Some of the valuable remarks of Blackburn, J., in the court below (*m*), may be cited in connection with these judgments of the learned lords. "No action lies against him who has put up the new window: there is no equity to restrain him from doing so: he has done an act perfectly legal, although it may be annoying to his neighbour. That neighbour may use his land just as before: if he does it so as to obstruct the unprivileged window, he, in his turn, does a lawful act, though it may be annoying to the owner of the unprivileged window. The motive for exercising the right may be a wish to obstruct the window: but his right is, to use his land as before, without any new restriction. I may seem pedantically punctilious in expressing this: but it

(*m*) *Jones v. Tipling*, 12 C. B., N. S. 843.

seems to me that much of what I consider the fallacy in reasoning of those from whom I differ consists in laying down as a premise that there is a right to obstruct the new window (which is true in the sense that it is not wrong to do acts otherwise lawful, though they have the effect of obstructing the window), and then reasoning upon it as if it were true in the sense that a fresh right was conferred, and therefore that acts, not otherwise lawful, became excused, if done in exercise of that right." Referring to the expressions previously used of 'material' prejudice to the owner of the servient tenement, 'substantial' variation, &c., the learned judge said, "I have some difficulty in understanding what is the meaning of the terms 'material,' 'substantial,' or 'essential,' as applied to such a question. Any window will in the course of twenty years become privileged, and then the owner of the servient tenement will be under a restriction not to use his land in such a manner as to obstruct this window. That restriction is the same whether the window be great or small. It is very true that the amount of the annoyance to the occupier of the land which is overlooked, arising from the intrusion on his privacy, is very materially greater when the window is large; but the law does not protect the right to privacy, as it does that to light and air. I only desire to point out that the restriction on the use of the servient land consequent on the privilege acquired by a window depends on its situation, and is independent of its size" (n).

From the grounds of the decision of the House of Lords, it was not necessary for their Lordships to

(n) 12 C. B., N. S. 838.

express their opinion on the view taken by the court below, that the obstruction might at first be lawful, but cease to be so on the restoration of the altered premises to their former state. However, Lord Westbury and Lord Chelmsford expressed themselves strongly against the correctness of this view.

The principle on which the decision in *Tupling v. Jones* is based, and which is perhaps most clearly expressed in the judgment of Mr. Justice Blackburn, is, that the power of the owner of the servient tenement to make such use of his own land as he pleases is already limited to a certain definite extent, and that this restraint is unaffected by any alterations of the dominant tenement. If new windows are opened looking over his ground which he cannot build so as to obstruct without infringing that restraint, he cannot obstruct them because of this pre-existing restraint, but no additional burden is thereby imposed on him. If he can build so as to obstruct them without infringing the previous restraint, he can still do so, until such time as they have themselves become privileged. In either case the previous restraint to its previous extent remains; nothing is added to it, and nothing diminished from it. The opinions expressed on the contrary were really based on the principle that privacy was a right acknowledged by the law, to this extent at least, that the further invasion of it released the owner of the servient tenement from the restraint to which he was previously liable. One important result certainly does follow from the alteration of the windows of the dominant tenement. Obstruction to the access of light and air to the altered windows is not a proof of infringement of the previous restraint imposed on the owner of

the servient tenement, if the windows be so altered as to be no longer identical with the ancient windows; and other evidence must be furnished of the infringement of the restraint. It is conceived, that a confusion of the continued existence of the test whether or not the restraint has been infringed, with the continued existence of the restraint itself, has not been without its effect in the decisions overruled by the House of Lords.

In *Tapling v. Jones* one ancient window remained unaltered. But Lord Chelmsford extends the principle of his decision to the case in which all the ancient windows are enlarged, though in whole or in part retained. "The appellants contend," said his Lordship, "that the owner of ancient lights is bound to keep himself within their original dimensions, and that if he changes or enlarges them in any way, although he retains the old openings in whole or in part, he must either be taken to have relinquished his old right, or to have lost it. But upon what principle can it be said that a person by endeavouring to extend a right can be said to have abandoned it, when so far from manifesting any such intention, he evinces his intention to retain it, and to acquire something beyond it? If under such circumstances abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture." (o)

The case in which new windows have been substituted for all the ancient windows, these entirely disappearing, has not yet received judicial decision. But it is conceived that the same principle will apply to this case also, and that the pre-existing restraint on the

(o) 11 H. L. Ca. 320; 34 Law J. Rep., N. S., C. P. 351.

owner of the servient tenement will remain unaffected by the change; that he will be able to build to the extent and in the places that he could before the alteration, but no farther, nor in any other places.

From what has been said with regard to abandonment and alteration, the effect of the destruction of the dominant tenement may be deduced. This destruction may take place either with or without the will of the owner. In the latter case the destruction is not even evidence of an intention to abandon the right, except it become so by the subsequent conduct of the owner, should he manifest an intention of not restoring the premises, as for instance, by leaving them un-restored for a considerable length of time. In the former case, the voluntary destruction of the tenement is a circumstance whence an intention to abandon the right may be presumed; but such a presumption may be rebutted by the owner doing some act to show his intention of restoring the premises. "I think, however," said Holroyd, J., "that the right acquired by the enjoyment of the light continued no longer than the existence of the thing itself in respect of which the party had the right of enjoyment, I mean the house with the windows; when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished. If, indeed, at the time when he pulled the house down, he had intimated his intention of rebuilding it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new house, when built, would in effect have been a continuation of the old house, and the rights

attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary to his house, if he pulls down the mill or the house, the right of common or of turbary will *primâ facie* cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the house or the mill without showing any intention to make a similar use of the land, and after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill, but the creation of a new thing, and the rights which he had in respect of the old house or mill do not, in my opinion, attach to the new house. In this case, I think the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of light, than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here, he does in fact substitute quite a different thing; a wall without windows" (p). And in the same case *Littledale, J.*, said, "If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to show that he did not mean to convert the land to a different purpose, then his right would not cease" (q).

Assuming that the destruction of the dominant tene-

(p) *Moore v. Rawson*, 3 B. & C. 337.

(q) S. C., 341.

ment does not take place under circumstances from which an intention of abandonment can be concluded, the effect of the erection of a new tenement in its place will be identical with the effect of alteration in the windows of a house entitled to ancient lights; that is, the restraint to which the owner of the servient tenement was subject previously to the destruction will continue without enlargement or diminution. It is true that *Cherrington v. Abney* (r) lays down that the lights must be "in the same place, and of the same dimensions, and not more in number than the lights of the old house;" but that can no longer be considered law. The remarks of Kindersley, V. C., in a case where the dominant tenement had been burnt down and then restored, are more to the point. "The question is, whether the windows of the house as it now stands are identically the same as the windows of the old house, which, it is not disputed, were ancient lights. The evidence on that point is not very direct; but the conclusion at which I have arrived is, that although the new windows differ somewhat in form, and perhaps very slightly in position, from the old windows, the area of the new windows is pretty nearly the same as that of the old ones.

"What then is the rule applicable to that state of things? When a house having ancient lights is burned or pulled down and rebuilt, and the question arises whether the character of ancient lights which belonged to the windows of the old house attaches to those of the new house, it appears to me that the principle to be applied to the solution of the question is, to inquire whether the new windows would impose on the servient

(r) 2 Vern. 646.

tenement either an additional servitude to that to which it was subject when the old house existed, or a different servitude from that which previously existed. And it appears to me that it is not every trivial or immaterial change which would prevent the new windows from possessing the character of ancient lights possessed by the old windows. To deprive them of that character, the change must be material either in the nature or in the quantum of the servitude imposed" (s).

This case was decided a few days before *Tapling v. Jones*, and the principle already stated as that on which the last case is based is not expressly recognized by the Vice-Chancellor's judgment. But his Honor's language may be brought into harmony with that principle, by considering him, when he speaks of the change preventing the new windows from possessing the character of ancient lights, to mean, not that the servient tenement is relieved from the pre-existing restraint, but that obstruction of the new windows is not a conclusive proof of an infringement of that restraint.



## SECTION II.

### *Of the Loss of the Right by Express Release.*

In order that the right to window lights be extinguished by express release, a release under seal is requisite, as in the case of other incorporeal hereditaments (t).

(s) *Curriers' Company v. Corbett*, 2 Dr. & Sm. 358.

(t) "These expresse releases must of necessitie be by deed;" Co. Litt. 264b; Com. Dig. Release, A. 1.



It has been shown in the last section, that even at law, writings not under seal and parol declarations may be used as evidence of the intention of the owner of the dominant tenement to abandon his right. But in these cases the easement is extinguished, not by the release contained in the writing or the declaration, but by the abandonment thereby evidenced (*u*).

Courts of equity, however, when the owner of the dominant tenement has by his conduct induced the owner of the servient tenement to incur expense by using his land in a way infringing the restraint to which it is subject, will prevent the dominant owner then insisting on his legal rights so as to defeat the object for which this expense was incurred. The authorities before cited to show that easements, in the acquisition of which persons have been thus led to incur expense, will be protected against those who afterwards try to defeat them by setting up their legal title, are authorities on this point also (*x*).

On this principle, it is considered by courts of equity the duty of the owner of a tenement to inspect the plans offered for his inspection by the owner of the adjacent premises contemplating alterations thereof. And if he do not in any way signify his disapproval of such intended alterations, a case of acquiescence will be raised against him. But no such case of acquiescence will arise from his failing to inspect the plans, if the plans would not have informed him of the true nature of the contemplated alterations, and how the access of

(*u*) *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682.

(*x*) Vide *Dann v. Spurrier*, 7 Ves. 231, and the other cases cited ante, p. 48.

light and air to his premises would be affected thereby; as, for instance, if they would not have shown to what height proposed walls would be carried (y).

And in a case before a court of law, it was considered a good equitable defence under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 83, that the plaintiff had consented to the construction of the offending building; it was also held a good answer to that defence, that the consent had been obtained by the false representations of the defendant (z).

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### SECTION III.

#### *Of the Loss of the Right by Unity of Possession.*

When the dominant and the servient tenement become the property of the same owner, the right to window lights, enjoyed by the one over the other, is extinguished. It, as is the case with all easements when the dominant and servient tenement come into the possession of the same owner, is merged in his general right of property to both tenements. He may retain the actual enjoyment thereof as a quasi-easement, but this has no legal existence so long as the two tenements both continue his property, though should he dispose of the quasi-dominant tenement for a valuable consideration, the quasi-easement actually enjoyed therewith will become clothed with the character of a legal right.

But in order that the unity of possession of the two tenements should have this effect, the owner in whom

(y) *Dunball v. Walters*, 12 L. T., N. S. 759.

(z) *Davies v. Marshall*, 31 Law J. Rep., N. S., C. P. 61.

they are united must have an equally high and perdurable estate in fee simple in the one as in the other, in the dominant as in the servient tenement. Otherwise the easement, though necessarily suspended so long as the union of ownership continues, is not extinguished, but revives on a severance of the ownership.

"Suspence commeth of *suspendeo*," says Lord Coke, "and in legall understanding is taken when a seignorie, rent, profit apprender, &c., by reason of the unitie of possession of the seignorie, rent, &c., and of the land out of which they came, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked. And they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perdurable estate in the one as in the other" (a).

In *Simper v. Foley* (b), Wood, V. C., said "I apprehend it is clear that the effect of an union of the ownership of dominant and servient tenements for different estates is not to extinguish an easement of this description, but merely to suspend it so long as the union of ownership continues; and that upon a severance of the ownership the easement revives."

The most striking instance of the application of the rule, that, to operate the extinguishment of an easement by unity of possession, the estates in the two tenements must be of an equally high and perdurable character, is found in the case of *Rex v. Inhabitants of Hermitage* (c).

(a) Co. Litt. 313a.

(b) 2 J. & H. 563; so *Thomas v. Thomas*, 2 C., M. & R. 41, per Alderson, B.

(c) Carth. 239.

The King Henry the 8th was seised in fee of lands formerly belonging to the Abbey of Sarum, which had by prescription common of pasture over Hermitage Common, parcel of the manor of Fordingbridge, which was parcel of the Duchy of Cornwall; and at the same time the King was in possession of the Duchy of Cornwall on account of the want of a Duke of Cornwall, and had a fee simple therein determinable on the birth of a Duke of Cornwall. It was held that this was not such an unity of possession as would destroy the prescription. The words of the report are, "But after much debate it was unanimously resolved by the whole court, that this was not such an unity of possession as would destroy the prescription, for although King Henry the 8th had an estate in fee in the lands *a quâ*, and also in the lands *in quâ*, yet he had not as perdurable an estate in the one as he had in the other, . . . and therefore an unity of such estates works no extinguishment; for when a unity of possession doth extinguish a prescriptive right, 'tis requisite that the party should have an estate in the lands *a quâ*, and in the lands *in quâ*, equal in duration, quality, and all other circumstances of right."

Unity of seisin is sufficient of itself to cause the extinguishment of an easement without actual unity of occupation (*d*). But the momentary seisin of a relessee to uses will not operate to extinguish an easement by unity of seisin. In a case in the Exchequer Chamber, where this point was raised, Tindal, C. J., said, "With respect to such relessee it is a known doctrine that, since the statute, he takes no interest whatever in the land; that on his account it can neither

(*d*) *Stott v. Stott*, 16 East, 343; *Clayton v. Corby*, 2 G. & D. 174.

escheat nor be forfeited; nor is it subject either to dower or curtesy on account of his momentary seisin. And we know of no authority, and without it there is no reason for holding that such momentary seisin of the land shall operate to extinguish a right of way by unity of seisin" (e).

It was in an earlier part of the volume observed, that several of the old cases treated certain easements as not extinguished by unity of possession, but by reason of their necessity revived on a severance of the possession. And it was then remarked, that if this were held to be the case with any easement of the present day, the case would be treated as one of a new grant of the easement on account of its necessity, not of its continuance in spite of the unity of possession (f).

By the civil law, on the union of the ownership of the dominant and the servient tenement, the servitude was extinguished by confusion; and in order that the servitude should revive on the severance of the two tenements, it was necessary that it should be expressly reimposed (g).

(e) *James v. Plant*, 4 Ad. & E. 766.

(f) *Sury v. Piggott*, 8 Buls. 339; Palm. 444; Pop. 166; Tudor's L. C. Conveyancing, 127; *Lady Brown's Case*, cited Palm. 446.

(g) "Servitutes prædiorum confunduntur, si idem utriusque prædii dominus esse cœperit."—Dig. viii. tit. vi. 1. "Si quis ædes, quæ suis ædibus servirent, cum emisset, traditas sibi accepit, confusa sublataque servitus est: et, si rursus vendere vult, nominatim imponenda servitus est: alioquin liberæ veniunt."—Dig. viii. tit. ii. 30.

## CHAPTER V.

## OF THE ENJOYMENT OF THE RIGHT UNDER SPECIAL COVENANTS.

It has been before remarked, that there are scarcely any instances to be found, in which the enjoyment of the right to window lights has had its origin in express grant or covenant directly conferring the right. When it has been desired to secure the enjoyment of this right by an express agreement, the object has usually been attained by the owner of the adjoining land entering into covenants restricting him from using his land in a certain specified manner, not by a simple covenant that he will in no way interfere with his neighbour's right to window lights. Such covenants are to the effect that certain land shall remain unbuilt on, or be kept as a pleasure ground, or that no building shall be erected on it above a certain height.

These covenants are subject to the common incident of covenants at law, that they will not, except as between landlord and tenant, run with the land so as to bind it in the hands of an assignee. In order to enforce them against such assignees, recourse must be had to a court of equity ; and the principles on which such a tribunal deals with cases of this class, the extent to which and the circumstances under which it will enforce such covenants will form the subject of the present chapter.

Such covenants are even in law binding on the assignee of a lessee, and the interposition of a court of equity is not necessary to enforce them in this case, except so far as it may be preferable to obtain the direct equitable remedy of their specific performance, instead of attaining the same object indirectly by the legal remedy of damages for their breach. But sometimes the assignee of the lessee himself seeks the aid of a court of equity, on the ground that it will protect a purchaser for value against legal claims and liabilities of which he has no notice. But this principle is one which the court is slow to apply to cases where persons have taken an assignment or underlease of property demised subject to such covenants, or to other covenants in favour of the lessor.

In *Parker v. Whyte* (a), the defendant was the sub-lessee of a sub-lessee. The original lease contained a covenant that no sale by auction should be held upon the premises. The defendant asked his mesne lessor at the time of his purchase whether there were any objection to his holding such sales on the premises, and was told there was none. But on this being urged as a defence to a bill filed to restrain his holding such a sale on the premises, Wood, V. C., said, "The true answer to the difficulty suggested, I take to be this:—Will the court allow a person to take a valuable house without any inquiry and then say, 'I will do anything I please, because I did not choose to find out from my lessor what interest he had in the property, and therefore I am not affected with notice?' If you simply take a sub-lease without conditions, you are entitled,

(a) 1 H. & M. 167.

and bound, to examine your lessor's title : if you have contracted not to do so, there may be a question as to the effect of that ; but if you do neither one nor the other, but enter without any inquiry of any sort, you must be taken to know that the property is held under some title or other ; and if you do not take any means to discover what that is, you cannot be looked upon as a purchaser without notice, which is the true ground of exemption in the cases cited. It is impossible to allow a person to shelter himself under a plea of purchase for value without notice, if he chooses to rest satisfied without knowledge which he has a right to require."

The same learned judge in a case in which a property had been sold, subject among other covenants to one not to open a public-house on the premises, and the agent of the covenantee, who had authority only to let and not to sell, informed a purchaser of some of the covenants, but not of that forbidding the opening of a public-house, held that the purchaser, knowing that he was dealing with an agent of limited authority, ought to have made inquiry of the purchaser, and therefore could not protect himself as a purchaser without notice, and was bound by the covenant (*b*).

With regard to the point suggested by the Vice-Chancellor in *Parker v. Whyte*, as to the effect of a contract not to inquire into the mesne lessor's title, the case of *Robson v. Flight* (*c*) may be referred to. There a house had been purchased under the usual condition not to inquire into the lessor's title. It was held, both by Romilly, M. R., and Lord Westbury, C., (though

(*b*) *Wilson v. Hart*, 11 Jur., N. S. 735.

(*c*) 5 N. R. 154, 344 ; 34 Law J. Rep., N. S., Ch. 101 (before the M. R.)



he reversed the decree on another point), that the purchaser could not on that ground maintain the defence of being a purchaser for valuable consideration without notice. His Lordship, said, "An attempt is made by the defendant, the assignee of the lease, to set up the defence of a purchaser for valuable consideration without notice; but as he bought under an engagement not to call for the lessor's title, he must have imputed to him the knowledge which, on prudent inquiry, he would have immediately obtained."

And in a recent case it was held that the under-lessee of a person who has covenanted not to carry on a particular trade on the property demised, was bound by the covenant, though such covenant was not contained in the original lease, but only in a mesne assignment thereof; and though the under-lessee had no notice of such covenant. The under-lessee in that case was considered by the Master of the Rolls to have constructive notice of the covenant, but his remarks apply equally to the case of the under-lessee's not having even such constructive notice. He said, "As to Sheat (the under-lessee), the plaintiff is entitled to a perpetual injunction. If not, observe what the consequences would be. A man makes a lease of a large piece of land to a builder; the builder erects buildings on it, and then assigns, making the assignee covenant not to carry on any noxious trade—as for example, that of a soap-boiler, which would be injurious to the neighbourhood. It is contended that the under-lessee may grant an under-lease, free from this covenant, to a person who may immediately afterwards set up this very trade to the injury of the whole neighbourhood. And this is a mischief which cannot be

guarded against, if this be a true statement of the law. I am of opinion, however, that an under-lessee cannot be put in any other position than he would be in if he had distinct notice of the original covenant" (*d*).

When covenants of this character do not at law run with the land, the principle on which courts of equity will enforce them on an owner of the property to which they have reference, who at law would be unaffected thereby, is, that as he has notice of the restrictions to which the land was subject under such covenants in the hands of the person from whom he purchased, his conscience is affected thereby, and he cannot be permitted to use the land in a manner inconsistent therewith.

Lord Brougham, C., did indeed in one case deny that the court would enforce a covenant which at law would not run with the land. "If such would be its construction at law," said his Lordship, "does the notice which the purchaser had of its existence alter the case in this court, upon an application for an injunction; or would it, upon the application, of a co-relative and co-extensive nature, for a specific performance? Certainly not. The knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorizes him to affect by his contracts—had attempted to create a real burden upon property which is inconsistent with the nature of that property, and unknown to the principles of the law,

(*d*) *Clement v. Welles*, L. R., 1 Eq. 200; 35 Law J. Rep., N. S., Ch. 265. *Flight v. Barton*, 3 M. & K. 282, was cited to the contrary. It, however, only proves that the mesne lessor may by his silence as to a covenant in the original lease, prohibiting the under-lessee's trade, be precluded from himself enforcing that covenant.

cannot bind such assignee by affecting his conscience. This court will never interfere, by way of injunction, or in any other more direct manner, to enforce such covenants, when satisfied that they could receive no support or countenance at law" (e).

Notwithstanding this decision of the Lord Chancellor, Shadwell, V. C., in a case where a vendee of the one part, and parties purchasing lots of building land from him of the other, had executed a deed of covenant, containing, among other mutual covenants, one to the effect that none of the proprietors of the lots for the time being should at any time carry on thereon the trade of an innkeeper, granted an injunction against a purchaser with notice of this covenant from one of the parties to the deed, at the instance of a purchaser of another of the lots from another of the parties thereto (f). And in the later case of *Mann v. Stephens* (g), before the same judge, a vendor had sold a house and had covenanted with the purchaser thereof that an adjoining piece of land, of which he was seised

(e) *Keppell v. Bailey*, 2 M. & K. 546, 548.

(f) *Whatman v. Gibson*, 9 Sim. 196.

(g) 15 Sim. 377. An order was afterwards obtained to commit the defendant for breach of the injunction, but Lord Cottenham, C., discharged that order, giving leave to the plaintiff to bring an action. Hence it was argued that Lord Cottenham thought the right of the plaintiff to relief in equity depended upon and was commensurate with his right of action upon the covenant at law. But his Lordship explained in *Tulk v. Moxhay*, 2 Phill. 778, that he upheld the injunction in *Mann v. Stephens*, though he discharged the order of commitment on the ground that it was not clearly proved that any breach thereof had been committed, as it was doubtful whether the spot on which the defendant was proceeding to build was not within the part where he was at liberty to do so. He gave leave to the plaintiff to bring an action that he might, if he thought fit, try this question.

in fee should for ever thereafter remain unbuilt on, except on a certain part and in a certain manner; and the house and the piece of land, after divers mesne conveyances, had become vested in fee in the then plaintiff and defendant respectively. The defendant, who had notice of the covenant, was proceeding to build a brewery on the land; but was restrained from so doing in violation of the covenant.

But the leading case on this subject, since which it has been conclusively settled that a covenant which at law will not run with the land, is binding in equity upon an assignee with notice, except in the presence of special circumstances which would render it inequitable to enforce the covenant, is *Tulk v. Moxhay* (*h*). In that case, the plaintiff was owner in fee of the garden in the centre of Leicester-square, and of several houses in that square. He sold this land to one Elms, who covenanted that he would keep the garden, in its then form, as a garden and pleasure-ground, in an open state and uncovered with any buildings, in a neat and ornamental order. By divers mesne conveyances the defendant became owner of the garden, and showed an intention to act in contravention of the covenant, of which he admitted he had notice at the time of his purchase. The plaintiff filed his bill for an injunction to prevent his so acting. The main argument of the defendant was, that the covenant would not at law run with the land; and that equity would not assist the plaintiff until he had established his right at law. Lord Langdale, M. R., however, granted the injunction. The case was then brought by appeal before

(*h*) 11 Beav. 571; 2 Phill. 774.

Lord Cottenham, C., who affirmed the decision, without calling on the plaintiff's counsel. The judgment of the Lord Chancellor was as follows:—"That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square-garden. And it is now contended, not that the vendee could violate that contract, but that he may sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said, that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price would be affected by the covenant, and nothing would be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land is evident from this, that, if there were a mere agreement and no covenant, this court

would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." His Lordship then commented on some of the previous cases, and concluded thus:—"With respect to the observations of Lord Brougham in *Keppel v. Bailey*, he never could have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it."

*Tulk v. Moxhay* has been ever since acknowledged as the leading case on this subject, and the principle thereof always followed by the court, and scarcely questioned in argument (i). Indeed the tendency has been to extend the application of the principle and to remove technical objections to its operation.

In a late case before the Master of the Rolls, he laid down that a vendor who had sold a piece of land to a purchaser subject to covenants in restraint of building, and had afterwards sold an adjoining piece of land to another purchaser, could not, after the latter sale, release the first purchaser from his covenant. The second purchaser had entered into similar covenants with the common vendor, and the Master of the Rolls held "that each purchaser could prevent the violation of these covenants by the other, and that this reciprocal right is handed down from successor to successor indefinitely, so that every one who receives a sub-

(i) *Patching v. Dubbins*, Kay, 1; *Coles v. Sims*, 5 De G. M. & G. 1.

stantial injury by the breach of this covenant is entitled to the assistance of the court for redress" (j).

In the case of *Piggott v. Stratton* (k), the defendant Stratton held two plots of land, A. and B., on a lease for 999 years, subject to covenants which preserved to the houses on plot A. a sea-view over plot B. The defendant underlet A. to one Harbour, to whom he showed the covenants of his lease, and asserted that he could not by reason of them block up the sea-view. The underlease contained a covenant by the defendant that he would perform the covenants contained in his original lease. The defendant afterwards surrendered his original lease to the ground landlord, and took a new lease not containing the former restrictions. His assignee proceeded to build on B., so as to obstruct the sea-view from A. Wood, V. C., at the suit of Harbour's assignee, restrained the defendant and his assignee from so building on B., on the ground of the representations by the defendant that he could not block up the view from A.; but he considered that the covenant in the underlease was limited in its operation to the period during which the original lease subsisted, and was destroyed by its surrender. But the Court of Appeal, Lord Campbell, and Knight Bruce and Turner, L. JJ., held that the plaintiff's legal rights under the covenant were not affected by the defendant's surrender, that he could after the surrender have maintained an action at law on the covenant, and that he was on that ground entitled to an injunction. They also thought that had the covenant been gone at law,

(j) *Western v. Macdermot*, L. R., 1 Eq. 507; 35 Law J. Rep., N. S., Ch. 195; affirmed by the Lord Chancellor, Dec. 4, 1866.

(k) *Johns*, 341; 1 De G. F. & J. 83.

an injunction would have been granted by a court of equity, on the ground taken by the Vice-Chancellor.

In *Child v. Douglas* (1), the defendant took by conveyance from persons exercising a power of appointment contained in a settlement, subject to a covenant not to build within a certain distance of an intended street. The plaintiff was a purchaser from the persons who took under the limitations in the settlement in default of appointment. Wood, V. C., held that the plaintiff had an equity to enforce this covenant against the defendant. He said, "It is argued, that the conveyance of part of this land to the defendant having been made under the operation of the joint power, and his covenant having been entered into with the donees of the power only, it in no way binds the land with regard to those persons who come in subject to the power under the limitations in the settlement; and therefore, although the question whether the covenant runs with the land may be immaterial, in no sense can the covenantees be considered to be trustees of the covenant for the persons who take under the subsequent limitations. I think, however, that any remainderman would be extremely surprised if he were told, that, though he had joined in executing this conveyance and imposing this condition on the purchaser, yet, when he came into possession of the rest of the property, under the settlement, the whole benefit of the condition, which he had endeavoured to obtain, was at an end, and that he could have no advantage from it. The real truth is, that the court invariably regards stipulations of this kind with reference to the benefit of the property which

(1) *Kay*, 560; reversed on another point, 5 De G. M. & G. 739.



is reserved by the vendor ; and looking at every possible analogy, even at law, I think I am bound to hold, that a covenant of this kind, though not strictly a reservation, is yet so analogous to it, that it would clearly enure to the benefit of parties interested under the settlement, like the reservation of a right of way in a similar conveyance."

In that case the objection was also raised that there was no reciprocal covenant for the benefit of the purchaser from the vendor as to the property retained by him. The plaintiff on his purchase had himself entered into a similar covenant with the vendor, but the Vice-Chancellor thought that, even had he not done so, the objection could not be sustained. "The reciprocal advantage," he remarked, "here obtained by the defendant, is, really, the conveyance of the land ; and it cannot be said, that for want of a reciprocal advantage, which he did not stipulate for, he cannot be compelled to perform that which he has expressly covenanted to do,"—and he pointed out that *Tulk v. Moxhay* was similar in this respect.

In *Coles v. Sims* (m) an attempt was made to take the case out of the rule on the ground that the vendor had covenanted with B. that he would procure A. to enter into certain covenants with B., and that this had not been done. Turner, L. J., said it was not necessary to say what the effect of this might have been if it had been shown that A. had been applied to by B. to execute these covenants and had refused to do so ; but he took it that the party who insisted on the point must show that application had been made to the other party to join in the conveyance.

(m) 5 De G. M. & G. 1.

Courts of equity will, however, act with caution in enforcing covenants of this nature, and will neither too hastily infer their existence, nor will extend their operation beyond what the construction of the instrument requires. In the case of the *Feoffees of Heriot's Hospital v. Gibson* (n), the governors of the hospital and the magistrates of Edinburgh, when selling certain lots of land for building in the line of an intended new street, exhibited a plan which represented certain old buildings, not the property of the hospital or magistrates, as taken down, so as to make the street of even width throughout its length. The charter granted to the purchasers contained nothing about any obligation on the grantors to purchase and remove these old houses, but the court of session held that the magistrates were bound to remove them. This decision was, however, reversed by the House of Lords, who held that the mere exhibition of a plan of a new street at the time of the sale of a piece of ground in the line of such intended street, did not of itself amount to an engagement that all that was exhibited on the plan should be carried into effect, more especially where the purchase was effected by a distinct contract put into the form of a charter, in which nothing was said about that which the purchaser now claimed on the ground of its having been represented on the plan. Their Lordships were much pressed with a case of *Deas v. Magistrates of Edinburgh* (o), in which Lord Mansfield had expressed himself strongly in favour of a right similar to that now claimed by the respondents; but their Lordships observed that Lord Mansfield had not actually given

(n) 2 Dow. 301.

(o) House of Lords, April 10, 1772 ; 2 Dow. 304.

any decision on the point, though possibly the proceedings in that case had been put an end to in deference to his opinion.

A similar point was raised in *Squire v. Campbell* (p). In that case an act of parliament empowered the Commissioners of Woods and Forests to make certain new streets according to plans therein referred to, and to grant leases of the land in the line of such new streets. The plaintiffs, who had taken leases of two such plots of land, filed their bill to prevent the erection of a statue in a space shown as left open by the plan referred to in the act of parliament; the act was not mentioned in either lease. An injunction to this effect was granted by the Vice-Chancellor of England, but Lord Cottenham, C., dissolved the injunction, and referring to the *Feoffees of Heriot's Hospital v. Gibson*, said, "We have the unqualified opinions of Lord Eldon and Lord Redesdale opposed, not to anything which Lord Mansfield had done, but to what in order to frighten the parties he had said, that after parties had matured their agreement into a written contract, you could not infer a contract from the mere exhibition of a plan. It is impossible not to assent to the doctrine expressed by these learned judges, and it is equally impossible to maintain the order appealed from, consistently with such doctrine."

And of course a court of equity will not strain the natural expression of the terms of the covenant, for the benefit of the covenantees. In a case before the Vice-Chancellor of England, a deed recited that one Pitt being seised in fee of the lands delineated in the plan

thereto annexed, and having it in contemplation to establish a spa thereon, had caused the plan to be drawn to show the mode in which the lands were intended to be laid out, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design. The deed contained covenants by Pitt to complete the pleasure grounds and keep them in order, and among them a covenant, that Pitt would on every agreement which should be entered into by him for the sale of any part of the building ground, require the purchaser to covenant not to erect any messuage which might lessen in value any other of the messuages erected. It was held that Pitt would not be restrained at the suit of a previous purchaser, from allowing the purchaser of an adjoining plot of ground to erect a house thereon, in a corresponding position to one from the erection of his house in which the former purchaser had been restrained by covenant, although the plaintiff alleged that the erection of a house in such a position would be injurious to his house. The Vice-Chancellor considered that power was expressly reserved to Pitt to vary the design, so long as he did not destroy the character of the pleasure ground attaching to the land; and that the covenant to secure erected houses from diminution of value by the erection of other houses would not authorize the interference of the court (*q*).

In a case before Wood, V. C., there was a covenant on the sale of a house and plot of land in a terrace, "that no building whatever, except monuments and tombs, should at any time be erected on any part of

the land belonging to the vendor, lying on the east side of the said terrace, and opposite to the plot of land thereby conveyed." The Vice-Chancellor thought the vendor meant at the time of the covenant that no building should be erected opposite to any part of the terrace; but he considered that he was obliged to construe the covenant so as to restrain building on that part only of the land retained, which lay immediately opposite to the house and plot conveyed, and was of the width of the plot (r).

Where land has been conveyed subject to a covenant that the purchaser shall not use the land conveyed to him in a particular manner, such restriction being imposed with a view to the enjoyment of adjoining lands by the vendor, and the character of these adjoining lands is so altered by the acts of the vendor and those claiming under him that the restriction is no longer applicable according to the intent and spirit of the covenant, a court of equity will not interfere to enforce the covenant.

This was settled by the great case of *The Duke of Bedford v. The Trustees of the British Museum* (s). In that case certain land was conveyed in fee by deed of feoffment; and the feoffee covenanted among other things that he would not erect any building thereon which should extend northward beyond the range of Southampton House, the residence of the vendors, the Bedford family. The land in time became the site of the British Museum, and the trustees thereof proposed to erect new buildings to the north of this

(r) *Patching v. Dubbins*, Kay, 1.

(s) 2 M. & K. 552.

line. The Duke of Bedford filed his bill for an injunction, but Lord Eldon, C., and Sir T. Plumer, M. R., without giving any opinion as to the rights of the parties at law, considered that the feoffors and those claiming under them had so altered the character of the adjoining property that the restrictions of the covenant were no longer applicable according to the intention and spirit in which they were entered into. They thought that the intention was to secure an open space in the vicinity of those great mansions, and that as the Dukes of Bedford had allowed all the adjoining land to be covered with buildings, the then Duke of Bedford could not in equity enforce a covenant, which had thus become inapplicable owing to the acts of those claiming under the feoffors. Lord Eldon said, "If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot under such circumstances come into a court of equity for a remedy which the court never grants, except in cases where it would be strictly equitable to grant it." And Sir T. Plumer said, "The question is, whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state. It was perfectly competent to the plaintiff to make what use he pleased of his contiguous lands; he was not fettered in so doing by any previous obligation to the contrary; and when he took upon himself to cover the vacant ground with buildings, the question is, whether, having regard to the mutual deal-

ings between the parties with respect to the property as it stood, both originally and afterwards, it is consonant with the principles of equity to interfere at this time of day. In that point of view it appears to be a consideration of great importance, more especially with reference to property in the metropolis, how far parties shall now be permitted to go back, and revive all the objections arising out of long antecedent covenants and engagements, and to give them such an application to the buildings of the metropolis in its present rapidly increasing state, that, while one party is left at liberty to obtain the most profitable consideration for his land, every obligation which is in the nature of restriction shall be enforced by that party as against the owner of the adjoining land. The question is not to be determined on the letter of the contract. By the letter of the contract, the Duke is under no positive engagement to leave the northern boundary open; but the question is, whether, according to good faith, and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its other condition."

In *Tulk v. Moxhay* (t), this case was cited on behalf of the defendants, and it was argued that the character of Leicester Square had been so changed by the opening of new streets under the authority of an act of parliament, that an ornamental garden had become useless and unnecessary. But Lord Langdale, M. R., said, "There is a manifest and plain difference between the two cases. In the case of *The Duke of Bedford v.*

(t) 11 Beav. 571.

*The Trustees of the British Museum*, one party who was seeking against the other the performance of the covenant had himself, and by his own acts, placed the property under such different circumstances, that it was perfectly manifest that there was no reciprocity: the parties were no longer in the same relative situations. It was said that there was a passage made through the north side of Leicester Square, and consequently (although it was made by authority of an act of parliament,) that of itself would vary the rights of the parties. I am clearly of opinion that this could not be so."

On a similar principle, a court of equity will not lend its assistance to enforce covenants of this nature, when the covenants were intended to secure the erection of buildings on one general plan for the common benefit of the occupiers of all the buildings, and the covenantee has acquiesced in such deviations from this plan, as will prevent the intended general benefit. So in the case of *Roper v. Williams* (*u*), the defendant Williams had sold the plaintiff a plot of building ground, and had covenanted that no houses should be erected on the adjoining land, except in a certain position and of a certain value. The plaintiff had acquiesced in the erection of certain houses in violation of the terms of the covenant. He now filed his bill against his vendor, and subsequent purchasers from him, to prevent a further, and, as he alleged, a grosser, violation of the covenant. But Lord Eldon, C., said, "This case is not within the range of cases between A. and B.; but it is a case in which persons claiming under A. have in equity ac-

(*u*) T. & R. 18.



quired rights both against A. and B., which could not be well treated of in a court of law. If the matter were *res integra*, I should say that Williams had bound himself in equity to make no new grant, without giving notice of this covenant to all subsequent grantors. The object which Williams had in view seems to have been, to have laid out the whole of the land upon a general plan, and to get as many grantees as he could to be subject to the same obligations as Roper; and the covenant entered into by Williams with Roper was for the benefit of all such grantees. Having long lived in Gower Street, I have often been in the habit of illustrating my view of such cases by reference to the stipulations contained in the Duke of Bedford's houses. In the lease of every house on the east side of that street is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating not only for his own benefit, but for the benefit of all the tenants in that neighbourhood. If therefore the landlord in some particular instances lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant to whom he has not given such a licence. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants. It is not a question of mere acquiescence, but in every case in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them, to have the general plan enforced for the benefit

of all. In such cases I have always understood this Court will leave the parties to their remedy at law."

To the same effect are his Lordship's remarks in *The Duke of Bedford v. The Trustees of the British Museum* (v): "Suppose, for example, there were ninety houses on the east side of Gower Street, and the Duke had allowed the tenants of eighty of them to raise their back buildings to a height extremely inconvenient to the others, from whom he withheld that permission, it could not be said that he was acting illegally or unlawfully in so doing; but it becomes quite a different question, if, under such circumstances, he files a bill to prevent those others from raising their washhouses or out-buildings. If such a bill were filed, it is questionable whether the court would not say it was clear from all the circumstances that each of those tenants thought he was entitled to the benefit which his Grace, by declining to enforce the covenant, had allowed to the rest."

But the court will not on this account refuse to interfere on behalf of the covenantees, when they have acquiesced in slight breaches of the covenant which will not be permanently or seriously detrimental to the common benefit designed. In a case before Shadwell, V. C., the owner of an estate built houses thereon, and sold some of them subject to a covenant not to carry on any trade, business or calling therein; and it was decided that schools were included in this prohibition. The Vice-Chancellor held that the covenantee had not waived the benefit of the covenant by allowing some of the houses to be used as schools, and restrained the

defendant from opening a school in one of the houses subject to the covenant. He distinguished the case from that of *The Duke of Bedford v. The Trustees of the British Museum*, saying, "There is an obvious distinction between that case and the present one; for a private house which has been converted into a school becomes again a private house as soon as it ceases to be used as a school. But land, which, like the Bedford estate, has been once covered with buildings, can never become pleasant open fields again" (w).

So in a recent case before Wood, V. C., the plaintiff had sold various houses to different purchasers under a covenant not to use any such house as a public-house or beer shop. They were held entitled to enforce this covenant against the occupier with notice of the covenant of one of the houses, although they had allowed the sale of beer to be carried on for a few months in another of the houses sold subject to the covenant, at the extremity of the row of houses, and upon a part of the premises which could not be seen from the front of the row (x).

And in a case before the Master of the Rolls there were covenants in a conveyance that the purchaser would not allow any tree or building in his garden to exceed the height of the parlour floor. A bill was filed against the assignee of this purchaser by the assignee of a subsequent purchaser of the adjoining house, No. 10, Brook Street, for building in his garden so as to violate the covenant and obstruct the access of light to the plaintiff's house. The second purchaser had him-

(w) *Kemp v. Sober*, 1 Sim. N. S. 517.

(x) *Mitchell v. Steward*, L. R., 1 Eq. 541; 35 Law J. Rep., N. S., Ch. 398.

self entered into similar covenants; there was also a covenant by the vendor that there should not be planted on any part of certain fields, called the King's Mead Furlong, and the Hayes, any trees which should exceed eight feet in height, and that no buildings should be erected thereon. The defendant urged that the plaintiff had acquiesced in previous breaches of the covenant, and had so, on the principle of *Roper v. Williams*, disqualified himself from obtaining the assistance of a court of equity. But the Master of the Rolls overruled this defence, saying, "Another ground of defence, which is prominently brought forward by the defendant in his answer, is, that this covenant has, by common consent, been wholly disregarded by the parties entitled to the benefit of it, including the plaintiff himself. This defence consists principally in the fact that trees from eight to forty feet in height have for many years been growing, and are now standing, on the lands called King's Mead Furlong and the Hayes; and that, along the southern and western boundaries, cottages have been built and are now standing, and that this has been acquiesced in by the plaintiff and his predecessors. That, besides this, trees and shrubs from eight to forty feet in height have been growing and are now standing, in the gardens of other houses forming the south side of Brook Street; and that, in particular, the plaintiff himself had a fig tree, a thorn, and a mulberry tree in his garden, which towered above the level described in the covenant; and that, though the fig tree and the thorn have been lopped down to the prescribed level since the institution of the suit, the mulberry tree still continues to lift up its head above the level to which it was limited by the covenant. In my opinion, this de-

fence is also ineffectual. I am by no means satisfied that these trees are any injury at all to any of the houses in Brook Street, or that this court would have granted an injunction to compel their being lopped to the prescribed level; and I am of opinion that the plaintiff, because he has not complained of certain breaches of covenant, which, in my opinion, have inflicted no injury upon him, has not thereby debarred himself from complaining of a breach which does affect the value of his property. If this contention were the law, then because the owner of the house No. 10 enjoyed the right of trees and shrubs in King's Mead Furlong, and encouraged their being planted there, he would have rendered himself liable to have a row of houses built at the bottom of each garden, wholly shutting out a striking prospect from the back rooms of his house and diminishing to some extent the free transmission of light and circulation of air. I am of opinion that he has not, by such means, lost the right to stop such injury to his property" (y).

It will be observed that in this case trivial breaches by the covenantee himself of a corresponding covenant were not considered by the Master of the Rolls to disqualify him from resorting to a court of equity to enforce his covenant, these breaches being such as not to injuriously affect the general plan for the common benefit. So in *Child v. Douglas* (z), Wood, V. C., considered that the plaintiff had not so violated a covenant, that no building should be erected within six feet of a certain intended street, as to lose the benefit of a

(y) *Western v. Macdermot*, L. R., 1 Eq. 507; 35 Law J. Rep., N. S., Ch. 195; affirmed by the Lord Chancellor, Dec. 4, 1866.

(z) *Kay*, 567.

corresponding covenant, by "the projection of his doorway, though built of brick, one foot beyond the prescribed limits, and still less, by the basement or foundation of his house, which for the height of one foot and a half projects two inches too far, the rest of the front of his house being thrown back to the required distance of six feet."

And the doctrine will not be strained in order to include cases in which the covenants do not really form part of one plan. In *Patching v. Dubbins* (a), above cited, where the defendant had sold to the plaintiff a house in a terrace, and had covenanted with him that no building should at any time be erected on any part of the land belonging to the defendant, lying on the east side of the said terrace, and opposite to the plot of land thereby conveyed. A dispensary had been erected on part of this land. On the plaintiff filing his bill to restrain a building being erected on such land more nearly opposite to his house, it was urged that he was, on the principle of the above cited cases, debarred from obtaining the help of the court by his own acquiescence. But Wood, V. C., said, "It is said that there was, on a former occasion, an acquiescence by the plaintiff, in permitting a hospital to be built upon a part of the land, which clearly, according to the plaintiff's construction of the covenant, would be within its terms. It has been argued, that the plaintiff is, on this account, precluded from raising the question now before the court. I do not think that the principle of acquiescence, which was so fully dis-

(a) *Kay*, 1. The Vice-Chancellor finally decided the case on the ground that the covenant only applied to the land immediately opposite to the plaintiff's house.

cussed in the case of the *Duke of Bedford v. The Trustees of the British Museum*, will at all apply to a case of this description. Lord Eldon, in that case, goes fully into the reasons for the conclusion there adopted. The doctrine is very concisely stated by him in *Roper v. Williams*, his Lordship there says, 'I have often been in the habit of illustrating my view of such cases by referring to the stipulations contained in the Duke of Bedford's houses. In the lease of every house on the east side of that street is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating not only for his own benefit, but for the benefit of all the tenants in that neighbourhood.' That case has, therefore, clearly no application to the present. It was the case of a landlord taking from several tenants restrictive covenants against the erection of buildings by them, in order to secure one uniform plan for the benefit of them all. This case is just the converse of that. Here the landlord has stipulated, for the benefit of each of the tenants, not to build upon the opposite land. I do not think that one of these tenants can be considered to hold his right for the benefit of all the other tenants who had similar covenants, or that any acquiescence on the part of any one of the tenants in an infringement, which, according to his construction of the covenant, does not injure him, can be material. That kind of acquiescence has nothing to do with the case."

The defence, that the plaintiff has acquiesced in the infringement of a general plan for the common benefit, cannot of course be raised when the question lies solely between covenantor and covenantee. But in these

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cases if there be acquiescence on the part of the covenantor in the breach of the covenant, or delay by him in complaining thereof, the court will, on its ordinary principle, refuse to interfere in his behalf. Lord Eldon said, "In every case of this sort, the party injured is bound to make immediate application to the court in the first instance; and cannot permit money to be spent by a person, even though he has notice of the covenant, and then apply for an injunction" (b).

It is, however, conceived that his Lordship's remarks as to the effect of delay even when there is notice of the covenant, were not intended to apply to the case where the covenantee gives distinct notice that he will assert his rights, and, if it be in his power to do so, will prevent the breach of the covenant, but is not in a condition to resort at once to the court. In *Coles v. Sims* (c), the Lords Justices affirmed the decision of Wood, V. C., to that effect. Knight Bruce, L. J., said, "There can remain but one question, a question of laches or conduct. Now the building here was intended to be begun in the month of June last, and in that month, so I understand, before any expense had been incurred on the ground in this respect, a gentleman acting as solicitor for the plaintiff, and on his behalf, expressed to the defendants, or one of them, the plaintiff's opinion that the defendants had no right to do the thing then intended (although the plaintiff was not then in possession of the instrument which gave him the right of prohibition), and stated in clear terms the plaintiff's objection and intention to prevent it if he could. It was in

(b) *Roper v. Williams*, T. & R. 23.

(c) *Kay*, 56; 5 De G. M. & G. 1.



effect a plain and distinct protest against the course intended by the defendants. Notwithstanding this, the defendants built or continued to build. The protest never was withdrawn. The suit was not instituted until the end of the following October, a circumstance which (if it were necessary to account for it) is fully accounted for by the want of proof, under which the plaintiff then laboured, of his title to effectuate the prohibition. The notice was, as I apprehend, sufficient; I must, therefore, hold the defendants to have proceeded in their own wrong."

In the case of *Child v. Douglas* (*d*), referred to a few pages back, the Lords Justices, overruling the decision of Wood, V. C., refused to interfere by interlocutory injunction to prevent the raising of a wall fifteen feet high, in violation of a covenant not to build within six feet of a certain street, on the ground that the plaintiff and his predecessors had for several years acquiesced in the erection of a wall five feet high on the same spot. It must, however, be observed, that there were other circumstances which, as well as this delay, led their Lordships to this conclusion. And also that the application was an interlocutory one, on which, as will afterwards be seen, a much slighter degree of acquiescence will induce the court to decline to interfere than must be proved in order to induce it to refuse its assistance at the hearing of the cause (*e*).

The Court of Chancery will not interfere to enforce these covenants, unless the breach causes a substantial injury to the person entitled to the benefit of the cove-

(*d*) *Kay*, 560 ; 5 De G. M. & G. 739.

(*e*) *Post*, Chap. VI. Sect. III.

nant. "I use the words 'substantial injury,'" said Romilly, M. R., "because it is, I think, clear that a mere nominal breach of covenant, which inflicted no injury at all, would not justify this court in interfering; but the court would, in that case, leave the parties to their remedy at law to obtain such compensation as they might be entitled to" (*f*). But of course it is not necessary, in order to enable the covenantee to obtain the aid of the court, that he should have been able to maintain a suit for the obstruction of his ancient lights. For in these cases the parties themselves have by their covenant prescribed the limits of injury, and by the covenant it is easy to ascertain whether injury has been done or not; the province of the court is not, as in a case of ancient lights, to decide whether the plaintiff has in the eye of the law received injury or not, but to decide the question of fact whether the covenant has or has not been violated, though it may consider the injury caused by the violation to be too trifling to call for its interference. Indeed by such a covenant the right to prospect may be secured, and would be protected by the court (*g*), though, as we have seen, there can be no right to prospect analogous to the right to ancient lights (*h*).

In *Coles v. Sims* (*i*), there was in the deed containing the covenants a stipulation for the payment of liquidated damages in case of a breach of covenant. It was argued

(*f*) *Western v. Macdermot*, L. R., 1 Eq. 507; 35 Law J. Rep., N. S., Ch. 195, and see the expressions of Wood, V. C., in *Child v. Douglas*, Kay, 567.

(*g*) *Attorney-General v. Doughty*, 2 Ves. sen. 453.

(*h*) Ante, p. 9.

(*i*) 5 De G. M. & G. 1.

that this remedy, provided by the parties themselves, excluded the interference of the court. As the cause was then before the court on an interlocutory motion, it was not necessary definitely to decide the point. But the Lords Justices strongly implied that they did not consider their jurisdiction excluded by such a clause. Knight Bruce, L. J., said, "If I were now deciding the cause, I should probably come to the conclusion, that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound, upon the ground of it, to refuse an injunction if otherwise proper to be granted; and that in the present case, the circumstances are such as to render it right for the court to grant an injunction." And Turner, L. J., said, "It is not necessary to give any conclusive opinion upon that subject; but if it were, I strongly incline to think that this is not a clause for liquidated damages excluding the jurisdiction of this court."

An objection has in some cases been taken to suits to enforce a covenant of this character, on the ground that the suit is defective for want of parties, as all the persons entitled to the benefit of the covenant ought to have been made parties to or represented in the suit. But such an objection was overruled in *Western v. Macdermot* (j), by the Master of the Rolls, who said, "It was suggested that this suit ought to have been instituted on behalf of all the other owners of the houses in

(j) L. R., 1 Eq. 508; 85 Law J. Rep., N. S., Ch. 196; affirmed by the Lord Chancellor, Dec. 4, 1866.

Brook Street; but I am of opinion that one alone is entitled to ask for redress, although others should decline to do so, or should disregard the act complained of. It may also well be that the injury is principally or almost entirely felt by one or two of the owners, and that those who are farther off sustain no inconvenience, in which case they could not be required to join in or support the application." The same judge in another case considered that the original covenantor was not a proper party to such a suit, if he had parted with his whole interest in the property, and was not in any way in fault (*k*).

But in a case where every allottee of a building society had entered into restrictive covenants with the trustees of the society, for the benefit of the persons for the time being claiming under conveyances already made to them by the trustees, one allottee instituted a suit against a purchaser from another allottee to restrain violations of these covenants. The Lords Justices held that the trustees were necessary parties to the suit. And Knight Bruce, L. J., said, he thought that the other parties interested ought, in some way, to be represented on the record (*l*).

Before quitting this branch of the subject, it may be observed, that a right to window lights may be acquired under such covenants, and may continue to exist, when the covenant itself has expired or has become inapplicable. For example, at the west end of London, houses, or plots of land for the erection of houses, are

(*k*) *Clements v. Welles*, L. R., 1 Eq. 200; 35 Law J. Rep., N. S., Ch. 265.

(*l*) *Eastwood v. Lever*, 33 Law J. Rep., N. S., Ch. 355; 3 N. R. 232.

frequently let upon leases for ninety-nine years, with a covenant by the freeholder that the land at their back shall be kept as a pleasure-ground free from buildings for that period. At the end of the time, the freehold of the pleasure-ground and the freehold of the adjoining houses will very possibly belong to different owners. The owner of the pleasure-ground will hold it discharged from the covenant and will be able to build thereon. But he will not be able to build so as to obstruct the window lights of the houses looking on to it. For the light and air will have been actually enjoyed for a period of more than twenty years, and so fulfil the requisitions of the 3rd section of the Prescription Act; and the covenantor's engagement not to build on the land for a given time will not constitute a written acknowledgment by the covenantee, under which the light and air are enjoyed, so as to bring the case within the exception in that section. So again, in case the lessee, by his acquiescence in acts of infringement of the covenant, destroying the general benefit intended by the original plan, has disqualified himself from obtaining the aid of a court of equity to enforce the covenants therein contained, it is conceived, that so long as he has not acquiesced in any act obstructive of his window lights, he will still be able to resort to a court of equity to obtain protection against any such threatened obstruction.

## CHAPTER VI.

## OF THE REMEDIES FOR INJURY TO THE RIGHT.

THE remedies for injury or obstruction to the right to window lights are, in theory, three in number;—abatement by act of the party injured, action at law, and suit in equity. In early times, the first was the ordinary remedy applied; it was then superseded by the second, as the violence of the former remedy became unsuitable to the more civilized state of the country; and of late the increased powers and superior machinery of courts of equity have in a great measure caused the second remedy to be in its turn superseded by the third.



## SECTION I.

*Of the Remedy by Abatement of the Obstruction by the Party injured.*

It is a general principle of English law, that a person who is injured by a private nuisance may himself abate it; and decisions to this effect are not unfrequent in the early reports. The principle, no doubt, is still in force; and the case of an erection obstructing ancient lights would fall within it. But in practice this remedy has become obsolete, as requiring the exercise of violence in a manner and to a degree inconsistent with the present character and habits of the country; and there are special difficulties in the employment of this mode

of redress for an injury to the right to window lights. This section has, therefore, an antiquarian rather than a practical interest; but the author feels that so long as the remedy exists in theory, it would be an inexcusable omission not to make some brief mention of the decisions which relate thereto.

In *Penruddock's Case* (a), the right of abating a nuisance was assumed, and the further point was moved in the King's Bench, "if the feoffee might abate the nuisance as the feoffor himself, and as well in the hands of the feoffee who did not the nuisance, as in the hands of the tort fesor himself; and if the feoffee of the house to which the house was made might do it (if he could it) before he had some special prejudice, or if he ought to stay till he had special prejudice. And Popham, Chief Justice, held that in both cases the feoffee might abate the nuisance, and that before any prejudice; for it is reasonable that he should prevent his prejudice, and not stay till it be done; which was granted by the whole court." The same case is thus reported by Judge Jenkins (b):—"A. builds a house, so that it hangs over the house of B. and is a nuisance to him; A. makes a feoffment of his house to C., and B. a feoffment of his to D., and the nuisance continues: now D. cannot abate the said nuisance, or have a *quod permittat* for it, before he makes request to C. to abate it; for C. is a stranger to the wrong; it would have been otherwise if A. had continued his estate; for he did the wrong: but after request, before prejudice sustained, C. may abate the nuisance, D. having the house."

(a) 5 Rep. 101b. The actual decision was that a *quod permittat* lay against a feoffee for a nuisance levied in the time of the feoffor.

(b) Jenkin's Centuries 260, Cent. 6, Case 57.

And Lord Coke, in a later volume of his "Reports," refers with approbation to this decision, and gives a compendious account of the remedies, in his day, for private nuisances. "*Nota* reader, there are two ways to redress a nuisance, one by action, and in that he shall recover damages and have judgment that the nuisance shall be removed, cast down or abated, as the case requires; or the party grieved may enter and abate the nuisance himself, as appears by 17 Edw. 3. 44; 9 Edw. 4. 35, and *Penruddock's Case*, but then he shall not have an action, nor recover damages" (c).

In *James v. Hayward* (d), it was held by three judges (Hyde, Jones and Whitlocke) against the opinion of Croke, C. J., on the two first points, firstly, that the erection of a gate across a highway was a nuisance; secondly, that this nuisance might be abated by a person damnified (e); thirdly, that such person, though he may remove the nuisance, must not destroy the materials thereof.

The decision in *Lodie v. Arnold* (f), does not seem quite to agree with this third head of the judgment in *James v. Hayward*, for there the defendant having pulled down a house built across the way, so that the materials rolled into the sea, the Court of King's Bench held, "That when H. has a right to abate a

(c) *Baten's Case*, 9 Rep. 54b.

(d) Sir William Jones' Reports, 221.

(e) "Ilz tient que le abatement del cest nusance fuit loyall; si particulier nusance soit fait, le partie ad election a porter un action, et par ceo means pur abate le nusance, et a recover damages, vel peut ceo abate."

(f) 2 Salk. 458. Perhaps the distinction may be between cases of public and private nuisance.



public nuisance, he is not bound to do it orderly, and with as little hurt in abating it as can be; and therefore was not answerable in this case for the rolling into the sea." A later case in the same reports is as follows:—"If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down; and for this reason only a small fine was set upon the defendant in an indictment for a suit in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights" (g).

In the case of *The Earl of Lonsdale v. Nelson* (h), with regard to the application of the remedy by abatement, a distinction was taken by Best, J., between nuisances by acts of commission, and those by acts of omission. He said, "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them (i). The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the cases which have occurred. The security of lives and pro-

(g) *Rea v. Rosewell*, 2 Salk. 459.

(h) 2 B. & C. 811.

(i) *Morrice v. Baker*, 8 Bulst. 196; 1 Roll. 893, per Croke, J. May not this be considered a nuisance of commission?

perty may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons shall not take the law into their own hands."

And in a case decided so lately as 1846, Lord Denman, C. J., expressly recognized the right of a person injured by a private nuisance to abate it. But he introduced a qualification which, coupled with previous restrictions thereon, leaves but little application for this remedy in cases of obstruction to window lights by another building. "There is no doubt," he said, "as a general rule, that a person who is injured by a private nuisance may abate it. No case has been found which establishes any distinction arising from the nature of the building which obstructs the exercise of a right; and, therefore, it may be assumed that the pulling down a house, provided no person be in at the time, may be justified, as much as the pulling down a barn or any other building. In this case, however, the declaration expressly alleges that the plaintiff and his family were in the house at the time when it was pulled down; and the question is whether that circumstance renders the pulling down unlawful. No express authority on this point is to be found; but it is said that the law respecting distresses, in which, as in the abatement of a nuisance, the party injured takes the remedy into his own hands, affords an analogy by which we ought to be guided. The law certainly forbids the distraining a horse on which a man is riding or tools which he is using on account of the imminent risk of a breach of the peace

taking place if such distress be made. Surely the risk of a breach of the peace is much more imminent in the case of pulling down a house in which persons actually are at the time. It is obvious that the act done is, under such circumstances, probably dangerous to human life, and calculated in the highest degree to excite violence and a breach of the peace. The law will not permit any man to pursue his remedy at such risks" (j).

In an early case it had been decided that a man could not before its completion abate that which when completed would be a nuisance. Lord Coke said, "As to the second matter, whether the defendant may pull down the nusans before the house is made, and become a nusans, I do much doubt of this; but I think he cannot do this, *Nemo tenetur divinare*, here it is only said *conatus fuit*, to edifie this house, and rear up the timber, the defendant hath no hurt by this, for he may afterwards leave off again." Houghton, J., said, "You have come too soon to cast this down before it was made, for if he have an intent to build a wall, and lays the foundation, you ought not to disturb him for this his inception, you cannot pull this down." And Croke, J., said, "One may cut down boughs if they hang over his ground; here the plaintiff hath not builded, and therefore what he hath done ought not to be pulled down" (k).

(j) *Perry v. Fitzhorne*, 8 Q. B. 775, 776.

(k) *Morrice v. Baker*, 3 Bulst. 196; S. C. *nom. Norris v. Baker*, 1 Roll. 393; Roll. Abr. Nuisance, U, Dejection, where the result is thus stated:—"Si home intend a erecter un mese (le quel mese si soit erect voilt estre un nusans a moie per estopper mon antient light de mon mese), et a cest purpose erect certain pieces de timber pur le edification, je ne pois dejecter cest timber, devant il ad fait plus, car ceo de luy mesme nest ascun nusans, et nest conus an il voilt proceeder en le

As then the possessor of ancient lights cannot abate a house which obstructs these lights, except he have certain information that no one is within the house; and as he cannot abate the house whilst still in progress on the ground that it will obstruct his lights when completed, his remedy by abatement is not of much practical use in this, the much most common, case of obstruction. Indeed, at the present time, we may apply to the abatement of a private nuisance what Lord Hale says of the abatement of a public nuisance; "because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice" (1).



## SECTION II.

### *Of the Remedy by Action at Law.*

An action at law was always a concurrent remedy with that by abatement for injury to the right to window lights; and when the remedy by abatement fell into desuetude from the causes mentioned in the last section, the action became and long continued the principal remedy for an injury to the right. The ancient forms of action employed in this behalf were those known as "*quod permittat prosternere*," and *assize of nuisance*; but these had become obsolete long before they were abolished by the 3 & 4 Will. 4, c. 27, s. 36. The

edification, *car nemo tenetur divinare*." Croke's remark is best given in Rolle's Reports, 394. "Si les rames de vostre arbre excresce en mon terre, j'eo poio eux succider, mes j'eo ne poio justifier le succider de eux devant ils excresce en mon terre par timor del' excrescer."

(1) Hale De Portibus Maris, Chap. VII., in Hargrave's Law Tracts, vol. I. p. 88.

action now directly applicable to the redress of such an injury is the action on the case (*m*), but, since the Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), the learning on the subject of the appropriate forms of action may be considered to have become practically unimportant.

In an action for injury to the right to window lights, as in one for the disturbance of other easements, the party in possession may sue for the disturbance of his enjoyment, however temporary its character (*n*), and the reversioner may also sue if the injury be of a permanent character and detrimental to the inheritance (*o*). The actions are independent the one of the other, and both tenant and reversioner are respectively entitled to damages for the injuries respectively inflicted on them by the same act. To enable the reversioner to bring an action, the injury must be of a permanent nature; but it will be considered to be so, if it be such as may possibly be detrimental to the reversioner's title, or afford evidence against the existence of the right (*p*). And a declaration will not be held bad on demurrer, if it allege an obstruction, which at the trial may or may not turn out to be injurious to the reversion (*q*).

(*m*) *Wells v. Ody*, 1 M. & W. 452.

(*n*) There would appear to be no reason why a tenant at will may not maintain such an action; and that he may do so has been decided in America. *Foley v. Wyeth*, 2 Allen, 135.

(*o*) Com. Dig., Action upon the Case for a Nuisance, B.; *Pomfret v. Ricroft*, 1 Wms. Saund. 322e; *Bedingfield v. Onslow*, 3 Lev. 209.

(*p*) *Shadwell v. Hutchinson*, M. & M. 350; 2 B. & Ad. 97; *Jesser v. Gifford*, 4 Bur. 2141; *Hopwood v. Schofield*, 2 M. & R. 34; *Metropolitan Association v. Petch*, 27 Law J. Rep., N. S., C. P. 330; *Bower v. Hill*, 1 Bing. N. C. 555.

(*q*) *Metropolitan Association v. Petch*, ubi supra.

The continuance of that which was originally a nuisance is, in fact, a new nuisance; and repeated actions may be brought either by the tenant in possession or by the reversioner, so long as the obstruction continues (r). "If the erection in the first instance was an injury to the reversion on any ground on which it can be put, the continuance must be so likewise" (s).

Indeed before the passing of the Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125), such repeated actions were the only mode by which the plaintiff could in a court of law compel the abatement of the nuisance. In consequence of this power of bringing fresh actions, it was held by the Court of Common Pleas that it was not permissible for the reversioner in his first action to produce evidence of the diminution of the saleable value of the premises arising from the nuisance; but that his first action should be for nominal damages to establish the right, and subsequent actions for substantial or vindictive damages (t).

The action may be brought either against him who erects the nuisance, or against him who continues it when erected (u). It is however laid down in *Penraddock's Case* (x), that request must be made to an alienec

(r) *Holmes v. Wilson*, 10 Ad. & E. 503; *Thompson v. Gibson*, 7 M. & W. 456; 10 Law J. Rep., N. S., Exc. 330; *Bonyer v. Cook*, 4 C. B. 286; 16 Law J. Rep., N. S., C. P. 177; *Battishill v. Reed*, 25 Law J. Rep., N. S., C. P. 290.

(s) *Shadwell v. Hutchinson*, 2 B. & Ad. 98.

(t) *Battishill v. Reed*, 25 Law J. Rep., N. S., C. P. 290; *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

(u) *Rosewell v. Prior*, 2 Salk. 460.

(x) 5 Rep. 101a. A similar point with regard to abatement was mentioned in the last section.

continuing a nuisance which he has not commenced, before a "*quod permittat*" lies against him; and from *Jones v. Williams* (y), it would seem that the omission to allege such notice in the declaration would be a ground for a demurrer.

If the owner of premises erect an obstruction to his neighbour's ancient lights, and then demise his premises in that condition, he is liable if the obstruction is continued by his tenant (z).

The liability of a purchaser of the reversion for a nuisance committed during the tenancy is concisely stated by Littledale, J. If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability: yet in such a case, if there were only a tenancy from year to year for any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it (a).

The rule with regard to the respective liabilities of contractors and employers for a nuisance caused in the

(y) 11 M. & W. 176.

(z) *Rosewell v. Prior*, 2 Salk. 460.

(a) *Rex v. Pedley*, 1 Ad. & E. 827; 3 N. & M. 631; 3 Law J. Rep., N. S., M. C. 121. This judgment was affirmed in *Rich v. Basterfield*, 4 C. B. 804; 16 Law J. Rep., N. S., C. P. 278; and in *Gandy v. Jubber*, 33 Law J. Rep., N. S., Q. B. 151.

execution of the work contracted for, appears to be as follows. When the nuisance is caused by the default or negligence of the contractor in executing the work, the contractor is the party liable; but when the nuisance is the direct and natural consequence of the work contracted for, the employer is so (*b*).

It would be out of place in this treatise to enter into a disquisition on the forms of pleading in actions at law; all necessary precedents, and all information required will be found in Messrs. Bullen and Leake's valuable work on Pleading (*c*). But the effect of two provisions in the Common Law Procedure Act of 1854, by which a jurisdiction previously confined to courts of equity was bestowed on courts of law, will be briefly noticed here. These are the powers to receive equitable defences, and to grant injunctions in certain cases.

The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), enables the defendant in any case, in which he would be entitled to relief against a judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence; and also enables the plaintiff to reply facts which would in equity avoid the plea (*d*). The courts of law have laid down and steadily adhered to the following rule in the application of these sections, that a plea on equitable grounds can

(*b*) *Gray v. Pullen*, 32 Law J. Rep., N. S., Q. B. 169; *Ellis v. Gas Consumers' Company*, 2 E. & B. 767; Bullen and Leake on Pleading, 2nd edit. p. 313.

(*c*) Vide pp. 301, 302, for counts in actions for obstruction to lights; pp. 338—340, for counts in actions for injuries to the reversion; p. 366, for the statement of right in the declaration, and the effect of the 5th section of the Prescription Act; pp. 629, 630, for pleas in action for obstruction to light.

(*d*) Sections 88—86.



only be supported at law where an absolute and unconditional injunction would be granted in equity (*e*). An equitable plea to an action for the destruction of window lights stated, "that the grievances complained of were occasioned by the defendant's pulling down a messuage of his and erecting another messuage in lieu of it, and the defendant pulled down the one messuage and erected the other, and expended thereby large sums of money, with the knowledge, acquiescence, and consent of the plaintiff, and on the faith that the plaintiff so knew of, and acquiesced in, and consented to the defendant's so pulling down the one messuage and erecting the other, and so spending such sums of money." This was held a good equitable plea; and a replication to it "that the plaintiff acquiesced and consented as in that plea mentioned upon the faith of false representations made to him by the defendant, viz., that the grievances complained of would not result from the pulling down of the one and erecting the other messuage, and expending of the money as in the plea mentioned," was held a good equitable replication thereto (*f*). From this case it would seem to follow, that if an easement be granted by parol, and the grantee go to expense in consequence, the court will in its equitable jurisdiction interfere to prevent the grantor's taking advantage of his legal title to disturb the easement.

The 79th section of the same act provides, "that in all cases of breach of contract or other injury, where the party is entitled to maintain and has brought an action, he may in like case and manner as hereinbefore

(*e*) Day's Common Law Procedure Acts, 241.

(*f*) *Davies v. Marshall*, 31 Law J. Rep., N. S., C. P. 61.

provided with respect to *mandamus* (*g*), claim a writ of injunction against the repetition or continuance of such a breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress." The three following sections contain other provisions in this behalf.

In order to entitle a party to claim a writ of injunction under this section, three circumstances must combine; he must have suffered injury, the injury must have been such as entitles him to maintain an action, and such action must have been commenced (*h*). The remedy, therefore, which courts of law have power to administer under this section is much more limited than that administered by courts of equity, for the mere danger or threat of such an injury is sufficient to found the jurisdiction of the latter courts.

There appears to be only one case reported in which this power has been put in motion for the redress of injuries occasioned by the obstruction of light. This was the case of *Jessel v. Chaplin* (*i*), where an injunction was granted by the Court of Exchequer, "to restrain the defendants from continuing the wrongful acts complained of in the action, and from committing any injury of the like kind relating to the property and rights of the plaintiff mentioned in the declaration, and from erecting, keeping erected, and continuing the erection of so much of the wall and buildings as was

(*g*) Vide the 68th and following sections.

(*h*) Day's Common Law Procedure Acts, 239.

(*i*) 2 Jur., N. S. 931.

opposite to a certain messuage of the plaintiff's mentioned and described in the declaration and known as, &c., so or in such manner as to darken any of the ancient lights or windows of the said messuage, and from erecting any other building, and doing any other act whereby the light and air coming to and entering his messuage by means of the said windows might be obstructed, or such messuage might be in any way darkened, and from the repetition or continuance of any act whereby an injury of a like kind might happen to the plaintiff." It was directed that the writ of injunction should lie in the office until the next Michaelmas term (*k*), the defendant undertaking to pull down as much of the wall and building as should be sufficient to restore to the plaintiff the full enjoyment of the light and air he had previously, and to do the same to the satisfaction of a surveyor to be agreed on or nominated by one of the judges of the court, the defendant paying the costs of the surveyor and the proceedings.

It will be observed that the injunction in this case was mandatory, enjoining a positive act. It is also to be observed that the court laid down that the granting of an injunction did not follow as of right upon the establishment of a legal right and proof of its invasion, but that the circumstances of the case would be taken into consideration (*l*).

The injunction, when granted, is a continuing motion, and it is not necessary that liberty should be reserved

(*k*) The case was heard on the 24th of May.

(*l*) Martin, B., referred to the words of section 82, The court or judge is to grant or deny the writ upon such terms, &c., "or otherwise as to such court or judge shall seem reasonable and just."

to the plaintiff to renew his application in case of any future breach (m).

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### SECTION III.

#### *Of the Remedy by Suit in Equity.*

Until a recent time it does not appear that resort was often had to courts of equity for the redress of injury to the right to window lights. For the right had, as a general rule, to be determined at law, before relief could be obtained from the court; and though occasionally the court would interfere by injunction, before the determination of the legal right, yet instances of such interference were very rare.

In an early case where a bill charged that the defendant was building so as to stop the plaintiff's lights, an injunction was prayed for to stop the defendant's building. But Lord King, C., denied this, because it would be a determining the right upon motion; but ordered that the defendant should receive a declaration in trespass or ejectment, as soon as the plaintiff thought proper, that the matter might receive trial (n).

Lord Hardwicke, however, on more than one occasion, granted an injunction against the defendant's proceeding to obstruct the plaintiff's lights till after a trial had at law (o). But he seems to have considered that

(m) *De la Rue v. Fortescue*, 2 H. & N. 324.

(n) *Bateman v. Johnson*, Fitzgib. 106, pl. 6; Vin. Abr. Stopping Lights, D. pl. 4.

(o) *Ryder v. Bentham*, 1 Ves. sen. 543; *Attorney-General v. Bentham*, 1 Dick. 277.

such a trial could only be had by the consent of parties (o).

Lord Eldon in one case appeared to think that there was no instance of an injunction to restrain a nuisance without a trial at law (p). But in another case he went so far as to grant an injunction against proceeding in a building which obstructed the plaintiff's ancient lights, on affidavit before appearance, and without notice, and without ordering the relators to discontinue an action they had commenced at law (q), but he afterwards dissolved this injunction on the defendant undertaking to remove the building causing the injury, if the verdict at law should be against him (r). And in another and later case he granted an injunction *ex parte*, to restrain the owner of a house from making any erections or infringements, so as to darken or obstruct the ancient lights and windows of an adjoining house (s).

The courts of equity gradually extended the exercise of their jurisdiction in cases of nuisance; and, in 1834 Lord Brougham, C., thus stated the principles on which the court then acted in such cases, "If the thing sought to be prohibited is itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But when the thing sought to be restrained is not unavoidably and in itself

(o) *Fishmongers' Company v. East India Company*, 1 Dick. 163.

(p) *Attorney-General v. Cleaver*, 18 Ves. 211.

(q) *Attorney-General v. Nichol*, 3 Mer. 687.

(r) *Ibid.* 16 Ves. 338.

(s) *Back v. Stacy*, 2 Russ. 121.

noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though, in particular cases, an issue may be directed for the satisfaction of the court, where an action could not be framed to suit the question. It is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not until very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or act complained of was admitted to be directly and immediately hurtful to the complainant" (t).

A great change was made in the power of courts of equity to decide questions of this nature by the 15 & 16 Vict. c. 86, "The Improvement of Jurisdiction of Equity Act." This act enables the Court of Chancery to determine the legal title of a party seeking relief without requiring the parties to proceed to law (u).

This provision enabled a person whose right to window lights had been injured, to obtain complete relief in a court of equity, without being turned over to a court of law for the decision of the question as to his legal title. The remedy to be obtained from a court of equity of course acquired a far more complete and beneficial character after the passing of this act; but it has been subsequently much improved by more recent statutory provisions.

The 21 & 22 Vict. c. 27, "The Chancery Amendment Act," commonly known as Sir Hugh Cairns' Act, gives

(t) *Earl of Ripon v. Hobart*, 3 Myl. & K. 179.

(u) Sect. 62.

the Court of Chancery power to assess damages and try questions of fact, either by a jury or by the court itself without a jury. And the 25 & 26 Vict. c. 42, "The Chancery Regulation Act," known as Mr. Rolt's Act, orders that the Court of Chancery shall determine every question of law or fact incident to the relief sought, unless it shall appear more convenient to the court to direct an issue to try a question of fact, or unless the matter shall appear to have been improperly brought into equity. Some remarks will be made later in the chapter on the effect of the provisions of these acts.

The first point to be considered is, in what cases will a court of equity interfere by injunction to restrain the obstruction of ancient lights? It is quite clear that a court of equity will not interfere where a court of law would not have done so; that the obstruction must be of such a character as to affect the comfort of those dwelling in the house, or to make the occupation of the house less beneficial for purposes of business (*x*). But judges have on several occasions gone beyond this, or have laid down that it is not every case in which an action can be maintained for the obstruction of ancient lights in which a court of equity will interfere by injunction; and that some farther standard of injury must be attained before this remedy can be applied.

The authority commonly cited for this position is that of Lord Eldon, who, in *The Attorney-General v.*

(*x*) *Wyntanley v. Lee*, 2 Swans. 333; *Sutton v. Lord Montfort*, 4 Sim. 559; *Clarke v. Clark*, L. R., Ch. 16; 35 Law J. Rep., N. S., Ch. 151.

*Nichol*(y), said, "Cases may exist, upon which this court could not interfere: yet an action upon the case might be very well maintained. The wall between a man and his neighbour may belong to the one, both in respect of property and the obligation to repair, and yet the other might support an action upon the case for making a window in it, or for raising the wall; but the consequence does not follow that a court of equity has any jurisdiction. The foundation of this jurisdiction, interfering by injunction, is that sort of mischief alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy an evil, for which damages more or less would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated by damages, but prevented by injunction." It must be owned that Lord Eldon's answer to the question, "what are the mischievous consequences which on equitable principles will be prevented by injunction," is liable to the charge of obscurity brought against it in the case next referred to.

In the case of *Jackson v. The Duke of Newcastle*(z), Lord Westbury, C., also asserted the existence of a distinction between cases in which an action at law can be maintained, and cases in which a court of equity will

(y) 16 Ves. 341.

(z) 33 Law J. Rep., N. S., Ch. 698; 4 N. R. 448.



interfere by injunction. He said, "It is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a court of equity. Something more is required than that amount of injury for which damages may be recovered at law. As observed by Lord Eldon, this court will not interfere upon every degree of darkening ancient lights and windows; but the standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief or to prohibit the continuance of the nuisance, has not been defined with any certainty." After referring to the passage of the judgment in *The Attorney-General v. Nichol* just cited, his Lordship continued, "The sentence is not very correctly worded, and when examined it amounts to this, that the court will interfere by injunction where the injury to the comfort of existence is such as to require that it should interfere by injunction. Probably the report, which in other respects is very inaccurate, does not do justice to the language of the noble and learned judge, and I think it may be collected that Lord Eldon meant to say, that where the darkening of the ancient windows of a dwelling has materially injured the comfort of those who dwell in it, the court would interfere by injunction. This rule or standard would have no application to a manufactory or business premises which are not occupied otherwise than for the purposes of some trade or manufacture. But upon a similar principle, where the obstruction of the ancient lights of a manufactory or business premises renders the buildings to a material extent less suitable for the business carried on in them it is, in my judgment, a case for an injunction, and not merely for compensation

in damages. The foundation of the jurisdiction appears to be, that injury to property which renders it to a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The court considers that injury of this nature does not admit of being measured and redressed by damages."

This rule given by Lord Westbury is clear in outline; but, when examined, it appears to be precisely the rule laid down by Best, C. J., in *Back v. Stacy* (a), as that rule is explained by Wood, V. C., in *Dent v. The Auction Mart Company* (b): "In order to give a right of action and to sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done."

In that case the Vice-Chancellor said, "The old doctrine which was established by Lord Eldon in *The Attorney-General v. Nichol* seems in substance never to have been departed from. The doctrine established in *The Attorney-General v. Nichol*, and recognized by Lord Westbury in the more recent cases of *Jackson v. The Duke of Newcastle*, and other cases, was this: 'There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained or an action upon the case, which, however, might be maintained in many cases that would not support an injunction.' In that one sentence is contained the whole of the doctrine which of late has been recognized as governing this

(a) 2 C. & P. 466.

(b) L. R., 2 Eq. 245 ; 35 Law J. Rep., N. S., Ch. 560.

court in its decisions, though it is not always easy to apply that doctrine when it has been enunciated." After concluding that the summing up of Best, C. J., in *Back v. Stacy*, with the substitution of "or" for "and," laid down correctly what would at law support a claim in respect of injury done to a building by the obstruction of light and air, his Honor continued, "Now it is apparent, even in that position at law, that the case is one of considerable difficulty and nicety, as all cases must be which involve matters passing by gentle gradations from simple annoyance which is not the subject of damages, to annoyance to the extent of rendering the habitation uncomfortable, or of rendering the mode of carrying on the business less beneficial than it formerly was.

"Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the farther difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and by Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this: that where substantial damages would be given at law, as distinguished from some small sum, of 5*l.*, 10*l.*, or 20*l.*, this court will interfere, and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any act of parliament for that purpose having been obtained. It appears to me it cannot safely be held that this court will allow parties so to exercise the rights which they may have in their soil as to inflict an injury upon their neighbour, if the neighbour is unwilling to take any compensation; or even though he

be willing to take compensation, if he is not ready to submit to the valuation of a jury, but insists on his own right to determine what the value of his property is."

After the delivery of the judgment in *Dent v. The Auction Mart Company*, the Attorney-General (Sir Roundell Palmer) said, "I do not know whether I might properly mention to your Honor that when that passage from *The Attorney-General v. Nichol* was cited in the argument in *Yates v. Jack*, as to there being cases in which a court of law would maintain an action when a court of equity would not interfere, the Lord Chancellor positively expressed his dissent from it, saying he did not see how that could be in the case of a continuing encroachment" (c).

Considering the opinions expressed by Lord Cranworth and Wood, V. C., and that Lord Westbury, though proposing to adopt the distinction drawn in *The Attorney-General v. Nichol*, yet gives the rule laid down in *Back v. Stacy* as the criterion whether a court of equity will interfere or not; it is conceived that now a court of equity will interfere by injunction to restrain injury to the right to window lights wherever a court of law would give substantial damages for the injury. Of course the inequitable conduct of the owner of the right may induce the court to withhold its aid from him, but it is submitted that, apart from such circumstances, the above is the general rule.

In one case the point was raised, whether a court of equity would interfere by injunction to prevent an injury to the right to window lights, simply on the ground of the damage to property thereby occasioned, when

(c) 35 Law J. Rep., N. S., Ch. 567. It appears that this remark was made during the argument, which accounts for its not appearing in any report of *Yates v. Jack*.

the plaintiff was not in the actual occupation of the property, and his personal comfort and convenience therefore were not affected. The point was elaborately considered by Kindersley, V. C., who disposed of it in the following judgment :—“ The defendant insists that, although the plaintiffs might be entitled to the assistance of the court in respect of the nuisance, if the plaintiffs themselves occupied the house, and so the nuisance affected their personal comfort and convenience, yet it appeared on the face of the bill that it was not the intention of the plaintiffs to occupy their houses or either of them, and that they had purchased the property merely as an investment; and it was contended that therefore the court ought not to interfere, inasmuch as the only injury the plaintiffs could sustain was diminution of the value of their property, for which compensation could be recovered at law. Now, I confess, when that objection was stated, I was at first much impressed by it; and at one time the inclination of my opinion was in favour of the objection. No doubt the origin of the jurisdiction in cases where the assistance of this court is asked for protection against a nuisance, and where the nature of the nuisance is the blocking up the passage of the light into ancient windows, is the interference with the personal comfort and convenience of the persons occupying the house which has the ancient lights. After further consideration, I am of opinion that the objection ought not to prevail. If the objection were allowed to prevail in such a case as the present, it must equally prevail in the most extreme case. Suppose it happened that the plaintiff's house, in which he did not himself reside, stood upon the very verge of his own ground; and the defendant, whose ground came up to the very wall of the plaintiff's

house, built a dead wall within six inches from the whole of the plaintiff's windows, and so completely blocked up all his lights, I confess I should feel very great difficulty in saying in such a case that this court would tell him to go to law and get damages, and refuse to interfere itself. But farther, I do not see how the line could be drawn so as to distinguish those cases in which the party complaining has acquired the house, not then intending to reside in it himself, and those cases in which he may intend to reside in it. A person may buy a house, not at the time intending to reside in it, but his then intention would not prevent him at any time afterwards making it his own personal residence. A man may buy a house which has a lease upon it, and therefore cannot become the occupant until the lease expire. He may, perhaps, not have any present intention of afterwards occupying the house; but how can I say, in such a case, that because there is no present interference with his personal comfort and enjoyment, he is not to have that remedy which the court gives in cases of nuisance, when it may be that he may afterwards reside in the house. He may induce the tenant to give up his lease, and he may himself become the occupier. When the court has once established the doctrine that it will interfere to protect the legal right, you cannot inquire particularly whether the party who complains does or does not mean at any subsequent time himself to be the occupier. And in a great number of cases this court does interfere to prevent an injury in respect of a legal right, simply on the ground of the damage which may be produced to property; and I think that I ought not to allow this objection to prevail" (d).

(d) *Wilson v. Townend*, 1 Dr. & Sm. 327.

Since this decision, there has been no doubt that a court of equity will interfere to protect the right by injunction, on the simple ground of preventing damage to property, and will not require a case of injury to personal comfort or convenience to be made out as a preliminary to obtaining its assistance.

The ordinary form of injunction is to restrain something intended or threatened by the defendant. But courts of equity have a still more powerful remedy, the *mandatory* injunction. By this they can compel a defendant to undo what he has already done. The court originally felt great doubt as to its power to enjoin a positive act, and therefore the mandatory injunction, though positive in effect, was couched in a negative form, and ran to restrain the defendant "from permitting to remain" (e), "from allowing a communication to remain open" (f), "from keeping the books of a partnership at any other place than the place of business" (g), "from impeding the navigation of a canal by keeping its banks out of repair" (h), "from preventing water flowing to a mill in such regular quantities as it had formerly done" (i). The jurisdiction of the court to enjoin a positive act is now fully established (k); but

(e) *Yates v. Jack*, L. R., 1 Ch. 298; 35 Law J. Rep., N. S., Ch. 544.

(f) *Earl of Mexborough v. Bower*, 7 Beav. 127.

(g) *Greatrex v. Greatrex*, 1 De G. & Sm. 692.

(h) *Law v. Newdigate*, 10 Ves. 192.

(i) *Robinson v. Lord Byron*, 1 Br. C. C. 588.

(k) Besides the cases referred to in the preceding notes, mandatory injunctions were granted in the following cases:—*East India Company v. Vincent*, 2 Atk. 83; *Rankin v. Huskisson*, 4 Sim. 13; *Spencer v. London and Birmingham Railway Company*, 8 Sim. 193; *Great North of England Railway Company v. Clarence Railway Company*, 1 Coll. 507; *Phillips v. Treeby*, 3 Giff. 632.

the injunction is, even at the present time, framed in the cumbrous negative form, a relic of the former hesitation of the court in this exercise of authority. The value of this remedy in cases of obstruction to window lights is evident, as the offending party may often have completed an erection sufficient to obstruct the access of light and air, before the decision of the court can be obtained, and even before a bill praying for its protection can be filed.

The present Master of the Rolls, indeed, on one occasion decided that in the case last alluded to, that of a building obstructing ancient lights being completed before the bill was filed, the Court of Chancery could not exercise jurisdiction on the matter, and could not grant a mandatory injunction to remove the obstruction. He considered, laying aside any ingredient of fraud, the rule of equity to be, "that if the injury was complete, if it was done and altogether finished, so that this court could not grant the injunction when the bill was first filed, then equity had no cognizance of the matter" (1).

But on appeal, the Lords Justices expressly negatived the existence of any such rule as that laid down by the Master of the Rolls, whose decision, however, they affirmed on other grounds. "The course of the court in granting mandatory injunctions," said Turner, L. J., "was gone into much at large on the part of the

(1) *Durell v. Pritohard*, 34 Law J. Rep., N. S., Ch. 599 ; 6 N. R. 308. The same view as that of the Master of the Rolls seems to have been entertained by Lord Langdale in *Ranken v. The East and West India Docks Railway Company*, 12 Beav. 306, as he represents Lord Cottenham as unable to do more than restrain the use of a bridge built before application made to the court.



plaintiffs, and a great number of cases upon the subject were cited. I have looked into these cases with as much attention as I have been able, and I do not find that any distinction has been taken in them as to the granting of such injunctions in cases of easements, and in other cases, and certainly they do not seem to me to warrant any such general rule as the Master of the Rolls has laid down being adopted in all cases. The case of *Deere v. Guest* (m), on which his Honor seems mainly to have relied in support of the rule laid down by him, does not seem to me to support it. It certainly does not in terms lay down any such general rule as his Honor has pronounced, and it does not seem to me to prove anything more than that the facts alleged in that particular case were not considered by the court to be such as to warrant the granting of the mandatory injunction which was asked by the bill. It would certainly not be consistent with the authorities to lay down any such general rule as applicable to all cases; and I can see no principle which can warrant its being laid down as applicable to cases of easements and not to other cases, for in many cases the damage occasioned by interfering with an easement is as great, if not greater, than would be occasioned by interfering with other rights.

“I cannot, therefore, venture to go as far as the Master of the Rolls appears to have gone in this case, or to say that relief by way of injunction ought to have been refused in this case upon the mere ground that the damage had been completed before the bill was

(m) 1 M. & Cr. 516. The court seems there to have considered that there was a sufficient remedy at law.

filed. The authorities upon this subject lead, I think, to these conclusions: that every case of this nature must depend upon its own circumstances, and that this court will not interfere by mandatory injunction, except in cases in which extreme, or, at all events, very serious damage will result from its interference being withheld" (n).

This rule, stated by the Lord Justice, that injunctions of this character will only be granted in very serious, if not extreme cases, has always been acknowledged by judges of courts of equity, and is amply borne out by the remarks of Lord Chancellor Westbury in *Isenberg v. The East India House Estate Company* (o). That judgment is especially valuable as pointing out the very beneficial effect of Sir Hugh Cairns' Act, 21 & 22 Vict. c. 27, in cases where, before the passing of that act, a court of equity must either have dismissed a plaintiff without remedy at their hands, or have inflicted an extreme penalty on the defendant. His Lordship said, "Every one of these cases must depend upon its own peculiar circumstances. The remedy given by the common law for a grievance of this description is an action for damages. That action is liable to be resorted to so long as the cause of damage continues. Upon that ground, and by reason also of the damage in many cases not admitting of being estimated in money, this court has assumed jurisdiction. Now, this jurisdiction, so far as it partakes of the nature of a preventive remedy, that is, prohibition of further damage, or an intended damage, is a jurisdiction that may be

(n) L. R., 1 Ch. 250 ; 35 Law J. Rep., N. S., Ch. 225.

(o) 33 Law J. Rep., Ch. 892 ; 3 N. R. 345.

exercised without difficulty, and rests upon the clearest principles. But there has been superadded to that the power of the court to grant what has been denominated a "mandatory injunction," that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made. The exercise of that power is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum. Where it admits of being so estimated, and where the evil sustained by the plaintiff may be abundantly compensated in money, there appears to be no necessity to superadd to the case the exercise of that extraordinary power by this court. I can easily understand cases in which an ancient mansion or family seat may be prejudicially affected, and where the remedy therefore can hardly be other than that of restoring things to their former condition. I can imagine the interruption of a supply of water that would entirely stop a flourishing manufactory, where it is impossible to estimate the future profits of the trade, or it would be difficult to define now a sum of money that may be a sufficient compensation for all injury hereafter. But that is not the case that is before me. I have got a case in which, I think, it is a matter of very doubtful result whether any damage has been sustained; but it is a case in which, beyond all question, without taking into consideration the confession of the parties, the whole of the injury that has been sustained by the plaintiff, the whole of the prejudice and damage to the plaintiff's

premises by the erection of the defendant's buildings, may be abundantly compensated in money. To what end, then, am I to exercise a jurisdiction which, in such a case as this, would simply be mischievous to the defendants, without being attended with correspondent benefit to the plaintiff, unless, indeed, I could approve of the plaintiff's taking advantage of the mischief and loss that the defendants would have to sustain, in order to aggravate and exaggerate his claim for pecuniary compensation? This is a case in which the benefit of the recent statute, giving power to this court to assess and ascertain damages, is peculiarly felt; and I hold it, therefore, to be the duty of the court, in such a case as the present, not to deliver over the defendants to the plaintiff, bound hand and foot, in order to be made subject to any extortionate demand that the plaintiff might by possibility make; but in which it is the duty of the court, instead of granting a mandatory injunction, to substitute an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained."

In accordance with the principle of Lord Westbury's judgment in this case was the decision of Kindersley, V. C., in *The Curriers' Company v. Corbett* (p), where he said, "If the defendant's buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is whether the court ought to or would order the pulling down of the buildings, or give compensation in damages. The defendant's new buildings are of considerable magnitude and importance,

while the two houses of the plaintiffs are comparatively of small value and importance ; and it has been decided that in such a case the court will not, as a matter of course, order the defendant to pull down his new buildings, but will give to the party injured by the erection of these buildings compensation in damages. It appears to me that this is precisely one of these cases."

In equity, as well as at law, both the reversioner and the occupier of the tenement possessing the ancient lights are entitled to ask for the protection of the court. "It is undoubtedly true," said Lord Westbury, "that not only may a tenant of premises threatened with a nuisance of this kind apply to this court for an injunction, but the owner of the reversion may also apply" (q).

The protection of the court will be extended to the occupier of the tenement, however short his interest therein ; as, for instance, to a tenant from year to year. In *Simper v. Foley* (r), Wood, V. C., said, "As regards the interest of the plaintiff in the matters in question in this suit, it is not usual for a bill of this description to be filed by a tenant from year to year ; but I know of nothing to prevent a tenant from year to year from filing such a bill if he be so minded." The Vice-Chancellor, however, limited the injunction to the period of the continuance of the plaintiff's tenancy.

And in *Jacomb v. Knight* (s), a tenant from year to

(q) In *Jackson v. Duke of Newcastle*, 33 Law J. Rep., N. S., Ch. 702 ; 4 N. R. 448 ; and in the lately cited case of *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355, the plaintiffs were reversioners.

(r) 2 J. & H. 564.

(s) 32 Law J. Rep., N. S., Ch. 601 ; 2 N. R. 49, 295.

year filed a bill against adjoining tenants holding under the same landlord, to restrain their erection of buildings interfering with the access of light and air to the premises occupied by him. The landlord thereupon gave him notice to quit, and at the time of the hearing only eight months of the tenancy were unexpired. The Master of the Rolls held that the slender extent of the plaintiff's interest constituted no reason for denying him the protection of the court, and awarded a mandatory injunction to compel the defendants to pull down their new buildings. The Lords Justices, however, though guarding themselves from saying that the small extent of the plaintiff's interest necessarily disentitled him to relief, yet held it to be a material ingredient for consideration; and, considering that the balance of convenience inclined much to refusing the injunction, they dismissed the plaintiff's bill without costs, without prejudice to any action that he might be advised to bring.

But here a distinction must be noticed between the shortness of the interest of the plaintiff, the occupier for the time being of the dominant tenement, and the shortness of the future existence of the dominant tenement itself. The former is not, the latter is, a conclusive ground on which a court of equity will refuse to interfere for the protection of the ancient lights. This distinction was well brought out by Wood, V. C., who said, "I may suggest a case in which the court would probably not interfere (not merely when the right is of short duration, for I have interfered in cases of very short duration with reference to the obstruction of light), but where the whole of the property is about to cease immediately—as, for instance, in the case of

notice given under a railway act to take a house, when the house is about to be destroyed and razed to the ground in two or three days' time. That is one of the cases in which damages might be given at law, and yet this court would not think it right to interfere" (t).

It is not required that the plaintiff should set out his title to the enjoyment of the ancient lights in detail on the pleadings. In a case before Wood, V. C., the plaintiff averred by his bill that he was the owner of a messuage, No. 3, Berkley-street, containing on the south and east sides thereof certain ancient lights and windows overlooking a certain yard, and that the plaintiff and his predecessors had for a period exceeding twenty years next before the commencement of the buildings by the bill complained of enjoyed the free and uninterrupted access of light and air across and over the said yard to the said ancient lights and windows in the plaintiff's house. It was argued that the allegation in the bill as to the plaintiff's title was insufficient, but the Vice-Chancellor said that the plaintiff had distinctly stated the existence of those windows, and the uninterrupted access of light and air for upwards of twenty years, and that that was quite sufficient (u).

An injunction may be applied for either on an interlocutory application whilst the suit is still pending, or at the hearing of the cause, when the question comes before the court for final decision. In the main, the same arguments may be used and the same defences employed on each occasion; but there are certain

(t) *Dent v. The Auction Mart Company*, L. R., 2 Eq. 247; 35 Law J. Rep., N. S., Ch. 562.

(u) *Gooch v. Marshall*, L. T., 1 N. S. 210.

matters which the court takes much more into its consideration on an interlocutory application, than at the hearing.

Of these the question of convenience is the most important example. It is true that, as Knight Bruce, L. J., said on one occasion, the balance of inconvenience on the one side and the other is a consideration of which the court never loses sight in injunction cases (*x*); but an injunction upon an interlocutory proceeding, when granted, is merely a mode by which the court considers it can preserve the property in the best possible manner, and with the least injury to all parties, until it can determine and settle their respective rights (*y*); and the question to be decided is chiefly one of comparative inconvenience (*z*).

Hence it follows, that even a small degree of acquiescence and delay on the part of the plaintiff will be a very strong inducement to the court to refuse to interfere by injunction upon an interlocutory application; for it is held just that the plaintiff should be the party to bear the inconvenience, when his conduct has helped to bring about that state of things in which inconvenience must result to one party or the other. And the judges have often laid down, that, to justify the court in refusing to interfere at the hearing of a cause, there must be a much stronger case of acquiescence or delay proved than is required upon an interlocutory application. For it is the duty of the court at the hearing of a cause to decide upon the rights of the parties, and

(*x*) *Jacomb v. Knight*, 32 Law J. Rep., N. S., Ch. 604.

(*y*) *Durell v. Pritchard*, 34 Law J. Rep., N. S., Ch. 600; 6 N. R. 310, per Romilly, M. R.

(*z*) *Child v. Douglas*, 5 De G. M. & G. 741, per Turner, J.



the dismissal of a bill upon the ground of acquiescence amounts to a decision, that a right which has once existed is absolutely and for ever lost. But the refusal of an interlocutory injunction on the same ground amounts only to a decision, that the conduct of the plaintiff has been such as to incline the court to regard his convenience less than that of the defendant (a).

It has been laid down that the court will not grant a mandatory injunction on an interlocutory application. Lord Hardwicke once said that he never knew an order to pull down anything on motion (b). And Kindersley, V. C., said, "It was useless to come for what was called a mandatory injunction on an interlocutory application. The court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing" (c).

This rule is not entirely without exceptions; but these seem to fall into two classes. The first, when there has been a contract not to perform certain acts, and a violation of that contract, in which case the party will be compelled to undo his acts (d). The second, when a simple and summary act has been done by the defendant which can as easily be remedied, and

(a) *Johnson v. Wyatt*, 2 De G. J. & S. 18; 33 Law J. Rep., N. S., Ch. 894; 3 N. R. 270; *Patching v. Dubbins, Kay*, 11; *Child v. Douglas*, ubi supra. In *Gordon v. Cheltenham Railway Company*, 5 Beav. 233, the same distinction was drawn by Lord Langdale, M. R., between acquiescence as an argument upon an application for an interlocutory injunction, and acquiescence as an argument in support of a demurrer.

(b) *Ryder v. Bentham*, 1 Ves. sen. 543.

(c) *Gale v. Abbott*, 8 Jur., N. S. 988.

(d) *Rankin v. Huskisson*, 4 Sim. 13.

the court thinks that the balance of convenience is in favour of granting the injunction (*e*).

It is of course not possible to particularize the different arguments which may be employed as defences at the hearing of the cause. But with regard to the balance of convenience, it may be mentioned, that should the court decline to grant an interlocutory injunction to restrain the defendant's proceeding with his building, and should he take advantage of this to complete his building, he will not be allowed at the hearing of the cause to use the argument *ad misericordiam* in respect of the inconvenience which would be occasioned to him by the demolition of this completed building (*f*). So, even on an interlocutory application, if the defendant has pushed on his building with extra speed, after the plaintiff has protested and applied to him to desist from such building, the court will not listen to any complaints as to the inconvenience which may arise from granting an injunction under such circumstances (*g*).

It has been already mentioned, in the chapter on the extent of the right to window lights, that it is no defence that other persons can profitably carry on the same business as the plaintiff with no greater amount of light than the plaintiff will have left after the completion of the defendant's buildings; nor that the plaintiffs have at times found their former supply of light too much for them, and have used artificial means to lessen it. Other defences of a similar character

(*e*) *Hervey v. Smith*, 1 K. & J. 389; *Robinson v. Lord Byron*, 1 Br. C. C. 588.

(*f*) *Dunball v. Walters*, 11 Jur., N. S. 579, per Romilly, M. R.

(*g*) *Gooch v. Marshall*, L. T., 1 N. S. 211, per Wood, V. C.

have at times been set up, and have been rejected by the court. One was, that the plaintiff might have improved his own window so as to increase the supply of light; of this Wood, V. C., said, "The plaintiffs cannot be compelled to make any alteration in their house to enable another to deal with his property more advantageously to himself" (*h*). Another, put forward in the same case, was, that the defendants would, if required, face their wall with glazed tiles, and so increase the plaintiff's supply of light. Of this argument the same judge said, "There was the suggestion of glazed tiles. As often as that has been suggested it has been, I may almost say, scouted by the court. A person who wishes to preserve his light has no power to compel his neighbour to wash the tiles or keep them clean; nor can he secure covenants that will run with the land, or affect persons who take without notice. Perhaps a mirror might do better still, but you cannot compel the mirror being kept there or being kept clean; and, therefore, the plaintiff is entitled to stand upon his own right, and not upon the degree of obligingness which his neighbour may from time to time show to him" (*i*). In a case before Stuart, V. C., it was contended that the plaintiff had himself so far obstructed the access of light and air to his own windows, as to have lost the right of seeking the protection of the

(*h*) *Dent v. The Auction Mart Company*, L. R., 2 Eq. 251; 35 Law J. Rep., N. S., Ch. 564.

(*i*) *Dent v. The Auction Mart Company*, ubi supra. Where, however, the erection was a screen of plated glass, such as would not of itself obstruct the access of light, but which, if not kept clean, would do so; and the defendant provided an apparatus by which the screen should be kept clean, Stuart, V. C., refused an injunction, *Radcliffe v. The Duke of Portland*, 3 Giff. 702.

court against a further encroachment. The supposed obstruction erected by the plaintiff was a flue eighteen inches in depth; the defendants' projected buildings were to be ten feet in depth. But the Vice-Chancellor considered that the plaintiff was entitled to an injunction; and that nothing short of an act by a plaintiff which will produce about the same amount of injury as that of that of which he complains will disentitle him to the help of the court (*k*).

The provisions of the Building Act, 14 Geo. III., c. 78, s. 43, afford no protection to a person who by raising a party wall in compliance with them has obstructed his neighbour's light (*l*).

And it is no defence to say that the alterations which occasion the obstruction will on the whole benefit the plaintiff, by making a better thoroughfare, improving the character of the neighbourhood, &c. (*m*).

Whether the court will or will not interfere by injunction in any particular case, must of course depend on the whole body of evidence in that case. The character and value of the evidence usually produced on this subject will be discussed in the next chapter. But it is proposed in this place to mention a few instances in which the court has or has not considered it proper to interfere, on the sole ground of the extent of obstruction to the access of light and air which would be caused by proposed new buildings.

A drawing-room window was faced by a wall at a distance of twelve feet, which rose to a height of ten

(*k*) *Arcedeckne v. Kelk*, 2 Giff. 683.

(*l*) *Wells v. Ody*, 1 M. & W. 452.

(*m*) *Stokes v. The City Offices Company*, L. T., 13 N. S. 82, per Lord Cranworth, C.

feet. It was proposed to raise the wall to a height of forty-eight feet. Wood, V. C., considered this a clear case for an injunction (*n*).

Lord Cranworth, affirming the decision of Wood, V. C., held that raising the opposite houses in a street only twenty feet wide, from thirty-six to sixty feet in height, was likely to be such a material interference with the plaintiffs' reasonable enjoyment of their own premises for the purposes of their trade, that they were entitled to an injunction (*o*).

The defendant had pulled down buildings varying from twenty to thirty-two feet in height, separated from the plaintiff's windows by a street twenty-five feet wide; he proposed to erect other buildings in their place, set six feet back, but sixty-seven feet high. Lord Cranworth considered the case one for an injunction (*p*).

The back of the houses of the plaintiff and defendant were in the same straight line. The back windows of the plaintiff's house looked into an area of twenty-seven feet wide. The defendant proposed to erect a projecting bow nine or ten feet in length at the side of this area. Stuart, V. C., considered the plaintiff entitled to an injunction (*q*).

The defendant, above a wall eight feet nine inches in height, raised a sloping roof, to the purline of which was twenty-three feet, and from the purline to the top twenty feet. The distance from the plaintiff's premises was sixteen feet. Stuart, V. C., said, the plaintiff was

(*n*) *Gooch v. Marshall*, L. T., 1 N. S., 210.

(*o*) *Stokes v. The City Offices Company*, L. T., 13, N. S. 81.

(*p*) *Yates v. Jack*, L. R., 1 Ch. 295; 35 Law J. Rep., N. S., Ch. 539.

(*q*) *Arcodeckne v. Kelk*, 2 Giff. 683.

entitled to an injunction, though not one of a mandatory kind (*r*).

On the other hand, Lord Cottenham said, that he had never known a building erected at the distance of thirty feet from the plaintiff's windows, and not more than half the height of the plaintiff's house, to be a nuisance; and he dissolved an injunction granted under such circumstances by the Vice-Chancellor of England, but put the defendant under an undertaking to deal with the building as the court should direct, in case the plaintiff should succeed at law (*s*).

The defendant erected a translucent screen of fluted glass, fitted with an apparatus to keep it clean, and with louvres for ventilation, at a distance of thirty feet from the plaintiff's premises. The screen was thirty-five feet high from the ground, and rose twenty-two feet above a wall then existing. Stuart, V. C., held that he should not be justified in granting an injunction (*t*).

Defendant's new building reduced the time during which the rays of the sun reached the plaintiffs' windows in the winter months, from two hours and a-half to forty minutes. Lord Cranworth, C. did not consider the plaintiffs entitled to an injunction (*u*).

In *Durell v. Pritchard* (*x*), there was evidence that

(*r*) *Lyon v. Dillimore*, 14 W. R. 511.

(*s*) *Smith v. Elger*, 3 Jur. 790.

(*t*) *Radcliffe v. The Duke of Portland*, 3 Giff. 702.

(*u*) *Clarke v. Clark*, L. R., 1 Ch. 16. It will be remembered that this was the case in which his lordship took the distinction between ancient lights in towns and those in the country, which he is believed to have since abandoned.

(*x*) L. R., 1 Ch. 244; 35 Law J. Rep. N. S., Ch. 223. In the report of the case itself it would seem that the court gave credence

the plaintiff had been deprived of an hour's daylight, being obliged to light his gas an hour earlier than before the alterations complained of; but the Lords Justices did not consider the case one for an injunction. Wood, V. C., in a subsequent case expressed his dissent from this decision (*y*).

In a court not sixteen feet wide, the defendant built a house of the uniform height of thirty-six feet eight inches high, in the place of a house thirty feet ten inches high, and thirty-one feet six inches wide, and a wall fourteen feet high and twelve feet six inches wide, backed by a higher wall. It appeared from the plaintiff's evidence, that in order to work he was obliged, since the alteration, to remove from the centre of the room to the window, but that then he could work as well as before. The Lords Justices held, reversing the decision of Kindersley, V. C., that this was not a case for an injunction (*z*).

Some difficulty has been felt by the judges in framing appropriate forms of order for injunctions in these cases, especially when the defendant has pulled down old buildings for which he is substituting the new buildings complained of. The ordinary form has been, "restrain the defendants from erecting any building so as to obstruct any of the ancient lights of the plaintiff as the same were enjoyed by him previously to the taking down of, &c.;" and if the injunction were of a mandatory

rather to the contrary evidence on this point; but in *Robson v. Whittingham*, L. R., 1 Ch. 445; 35 Law J. Rep., N. S., Ch. 228, Turner, L. J., gives this as the result come to by the court in that case.

(*y*) *Dent v. The Auction Mart Company*, L. R., 2 Eq. 254; 35 Law J. Rep., N. S., Ch. 566.

(*z*) *Robson v. Whittingham*, L. R., 1 Ch. 442; 35 Law J. Rep., N. S., Ch. 227.

character it continued, "and also from permitting to remain any buildings already erected which will cause any such obstruction." But Lord Westbury, C., expressed a very strong objection to a form of this kind in the case of a mandatory injunction, saying, "It seems to me from this form of order impossible that any human being can comply with it. As was said in an old case, this injunction, instead of being a rule of conduct, only creates a snare for the defendant. If I grant a mandatory injunction, I must define clearly in the order what I have declared to be done" (a).

And to the same effect were the remarks of his Lordship in another case, "The first duty of the court in granting an injunction of this kind is to lay down a clear and definite rule. If the language of the order in which the injunction is contained be in itself ambiguous, uncertain, indefinite, giving no clear rule of conduct, the injunction becomes a snare to the defendant. If he violates it, he is liable to be imprisoned. It is the bounden duty of the court, therefore, in granting an injunction, to take care that the language of its order shall be such that it is quite plain what it permits and what it prohibits" (b).

But however desirable it may be that the language of an order for an injunction should point out with perfect clearness what it is which it prohibits the defendant to do or to erect, it is very hard to effect this object, except by reference to the plaintiff's ancient lights, as enjoyed by him previously to the alterations, and there will often be disputes as to what was the extent of those lights at

(a) *Isenberg v. The East India House Estate Company*, 3 N. R. 346.

(b) *Low v. Innes*, 10 Jur., N. S. 1039.



that time. Some of the inconveniences which arise hence seem to be obviated by a change in the form of the order introduced in a late case by Wood, V. C.: His Honor said, "It is extremely inconvenient to have questions of the amount of interference with light and air determined by continual motions for committal; and if you can arrive at a conclusion between the parties which will free the person under the injunction on his part from inconvenience, by enabling the parties to ascertain what their position is, no doubt it is a beneficial course to adopt. Whether it can be done in this particular case before me, I cannot say, but I am anxious that every step that can be should be taken; and therefore what I now propose to do is, to grant a perpetual injunction to restrain the defendants from erecting any building in front of the messuage, No., &c., so as to darken, injure or obstruct any of the ancient lights or windows of the same messuage as the same ancient lights and windows were enjoyed previously to the taking down of the said ancient houses or buildings which formerly stood in front of the same messuage, with liberty for the defendants to apply in chambers, as advised, in respect of the erection of any buildings on their property, so as not to infringe the above order" (c).

A similar provision was adopted in a later case by Lord Cranworth, C., who said, "I am obliged to frame the decree in this general form, leaving it to the plaintiffs to apply by notice in case the terms of the injunction are violated. I shall, however, be willing to introduce a proviso into the order, similar to that adopted in the case of *Stokes v. The City Offices Company*, ena-

(c) *Stokes v. The City Offices Company*, 11 Jur., N. S. 561.

bling the parties to come before the chief clerk in order to have it ascertained whether any proposed addition to the building will or will not be a violation of the injunction; and it must be also in like manner left open to the plaintiffs to show, if they can, that the buildings already erected materially interfere with the light heretofore enjoyed by them "(d).

By the 21 & 22 Vict. c. 27, the court received a new power, that of awarding damages, either in addition to or in substitution for its old remedy by injunction.

It has been considered by the equity judges, that this statute was intended to enlarge the remedial powers, not to extend the jurisdiction of the court. So that if a case be brought before the court, the nature of which is such that the court could not have dealt with it, either by its remedy of injunction or by that of specific performance, the court will not now entertain that case and award damages in respect thereof. But if the case be by its nature adapted for these equitable remedies, and the application of them is precluded by peculiar circumstances, or thought inadvisable in the discretion of the court, then damages may be awarded under the act. So, also, if the old equitable remedy would only go to part of the case, the court will award damages in respect of the remaining part thereof.

As to the first point, that the act does not extend the jurisdiction of the court, in *Howe v. Hunt* (e), a suit for specific performance of a contract, Romilly,

(d) *Yates v. Jack*, L. R., 1 Ch. 298; 35 Law J. Rep., N. S., Ch. 544. The injunction was partly mandatory, which explains the last paragraph cited.

(e) 31 Beav. 421.

M. R., said, "My opinion certainly is, that Sir Hugh Cairns' Act, enabling this court to give damages, was never meant simply to transfer the jurisdiction from a court of law into equity, and that when persons enter into a contract and know that specific performance cannot be given, they cannot come into equity merely for the purpose of obtaining damages." And in a suit for an injunction, his Honor said, "I do not apprehend Sir Hugh Cairns' Act means to extend the jurisdiction of courts of equity to cases where they would not have interfered at all before. If there was a case in which the court would not stop a way which had been made across a person's field, or would not stop buildings which obscured ancient lights or direct them to be pulled down, the court would not itself direct an inquiry as to damages, but only where it had jurisdiction in the other matter. Sir Hugh Cairns' Act was not intended to make it possible for a person to bring a suit in chancery merely to obtain damages, where an action at law is the ordinary and a much cheaper and more convenient mode of ascertaining the damages" (f).

But that when the case is one of a nature adapted for an equitable remedy, which under the circumstances of the case cannot be applied, the court will under this act award damages, is shown by *Eastwood v. Lever* (g). In that case, Turner, L. J., considered that the plaintiffs were disentitled by their acquiescence from obtaining an injunction against a breach of covenant, but that they might be entitled to damages for any

(f) *Durell v. Pritchard*, 34 Law J. Rep., N. S., Ch. 600 ; 6 N. R. 810 ; vide also, *Rogers v. Challis*, 27 Beav. 175 ; *Chinnook v. Sainsbury*, 9 W. R. 7 ; *Norris v. Jackson*, 1 J. & H. 819.

(g) 33 Law J. Rep., N. S., Ch. 355 ; 3 N. R. 232.

injury that might have been done to their property by the violation of the covenant. And the most useful application of the statute has been said to be where, otherwise, the only remedy which the court could have granted would have been a mandatory injunction, and that remedy would have produced more mischief to the defendant than benefit to the plaintiff (*h*).

The act has also been found very beneficial in cases in which the court could previously take cognizance of a suit in one respect only, and could apply its remedy to part of the relief sought, and to part only. Of its effect in this behalf, the Master of the Rolls said, "If there is a case in which an injunction can be granted by this court, in which the plaintiff has shown a right to an injunction, the court, then, feeling its way to grant an injunction to some extent, does not then require the parties to be put to a circuitry of action, and to bring an action at law for recovery of damages; but if he has shown no right to an injunction, then his right is at law, and he has no case for coming into equity." On this principle, his Honor, in a case in which a small part of the defendant's buildings had been completed since the filing of the bill, granted an injunction to remove that part, and referred it to chambers to ascertain what damage the plaintiffs had sustained from the part completed before the filing of the bill (*i*).

(*h*) *Isenberg v. East India House Estate Company*, 83 Law J. Rep., N. S., Ch. 892; 3 N. R. 345; *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355.

(*i*) *Lawrence v. Austin*, 34 Law J. Rep., N. S., Ch. 598; 6 N. R. 310.

So in *Hindley v. Emery* (*k*), where a bill was filed to restrain dilapidations, most of which were completed at the filing of the bill, Wood, V. C., directed an inquiry as to the damages caused by the dilapidations then completed. He said, "It may be conceded that if all the mischief had already been completed, before the filing of the bill, this court would not have had power to entertain the suit for injunction; and if that were so, could not grant damages for the mischief done; but it appears that, in this case, there was yet room for its intervention, by way of injunction, to protect from further injury the buildings still standing at the filing of the bill, and to restrain the farther breach of the defendant's express covenant, not to injure or pull down the principal timbers or walls thereof. That being so, I think the court has jurisdiction to assess damages for the breach of covenant already committed. The intention of the act, 21 & 22 Vict. c. 27, was to give the court power to grant complete relief wherever it had a well-founded jurisdiction to entertain the case, and not to compel a plaintiff to seek a partial relief in one court, and then turn him over to another in order to obtain supplemental relief." And on the same principle, when the defendant had entered into an agreement with the plaintiff to accept a lease and to build a house, the same judge held that the court would decree

(*k*) L. R., 1 Eq. 52; 35 Law J. Rep., N. S., Ch. 6. Both the Master of the Rolls and the Vice-Chancellor seem to have considered that the court had no jurisdiction to grant an injunction in respect of damage done before the filing of the bill. The Lords Justices, however, decided the contrary in *Durrell v. Pritchard*, L. R., 1 Ch. 244; 35 Law J. Rep., N. S., Ch. 223.

specific performance of the part of the agreement as to taking the lease, and would, under this act, award damages for the non-performance of the part as to building the house, in respect of which part of the agreement the court, previously to the statute, had no jurisdiction (*l*).

In the application of this principle, where the court is pressed with the argument that as it has taken cognizance of the case in one respect it should take cognizance of it in another respect, it must be remembered that, as the Master of the Rolls once said when this argument was urged upon him, it does not follow that the court has taken cognizance of the suit simply because the plaintiff has asked it to take cognizance of the suit (*m*).

The act leaves it in the discretion of the court whether it will award damages or not, and if the court thinks that the question of damages can be more satisfactorily tried at law, it will dismiss the bill (*n*). But having regard to the spirit and intention of the Chancery Regulation Act, 25 & 26 Vict. c. 42, it will be inclined to exercise the jurisdiction (*o*).

(*l*) *Soames v. Edge*, Johns. 669. See also on this point, *Davenport v. Rylands*, L. R., 1 Eq. 302; 35 Law J. Rep., N. S., Ch. 204, where the court in a patent case granted an inquiry as to damages, though the patent had expired before the hearing. It had refused this before the act. *Price's Patent Candle Company v. Bauman's Company*, 4 K. & J. 727.

(*m*) *Durell v. Pritchard*, 34 Law J. Rep., N. S., Ch. 600; 6 N. R. 810.

(*n*) *Durell v. Pritchard* (on appeal), L. R., 1 Ch. 252; 35 Law J. Rep., N. S., Ch. 226, per Turner, L. J.

(*o*) *Johnson v. Wyatt*, 2 De G. J. & S. 18; 33 Law J. Rep., Ch. 394; 3 N. R. 272.

The court has no power under this act, after decree, to add an order upon motion in the cause for assessing damages arisen subsequently to the decree. An application to this effect was lately made to Kindersley, V. C., but he said, "Since the decree certain facts have occurred from which it is alleged that damage has arisen to the plaintiffs, and I am asked to put this construction upon the act,—that it is competent to the court, on motion after decree, to make an order giving to the plaintiffs some further relief beyond what they were entitled to have at the time when the decree was made; that is, in other words, that the court may make a supplemental decree on motion in the cause, on facts which have happened subsequently to the decree: that cannot be the right construction of the act. It is said that the court will not be doing complete justice unless it makes the order now asked for. But it must be recollected that before this act the Court of Chancery had no power to give damages at all; and although the act has given the court power in certain cases in making a decree to give damages upon the facts then alleged and proved, it could not have been intended to give the court power to make an order on motion, which would in effect be a supplemental decree founded on what has occurred since the decree was made" (p).

The court cannot under this act, nor under 25 & 26 Vict. c. 42, order an inquiry as to damages on an interlocutory application (q).

Nor will the court, except by the consent of both

(p) *Corporation of Hythe v. East*, L. R., 1 Eq. 620.

(q) *Wedmore v. Corporation of Bristol*, 1 N. R. 187, per the Lords Justices, overruling the decision of Stuart, V. C., 1 N. R. 120.

sides, order a trial by jury before the hearing of the cause (r).

It is not necessary that damages should be specifically prayed for by the bill, to give the court power to award them (s).

With respect to the effect of the Chancery Regulation Act, 25 & 26 Vict. c. 42, on the exercise of the jurisdiction of the court, it is clear that the act was intended to remedy the following evil. Parties who came to a court of equity for relief could not have their cases fully disposed of by the court of equity, but were sent to a court of law to have other points determined on which their rights depended. The true construction of the act is such as will diminish this evil and extend the remedy. And, therefore, the court now considers itself obliged to decide all questions of law or fact on the determination of which the title to relief or remedy in equity depends, subject of course to the provisions contained in the 2nd and 4th sections of the act (t).

And in a case in which Stuart, V. C., had directed a question of fact to be tried by a jury at common law, in virtue of the power reserved to the court by the 2nd section, considering that the state of business in his court made it more convenient that the case should be so tried, Lord Westbury, C., discharged this order saying, that it was now, in accordance with the statute,

(r) *George v. Whitmore*, 26 Beav. 557 ; 28 Law J. Rep., N. S., Ch. 720 ; approved by Kindersley, V. C., in *Bradley v. Bevington*, 4 Drew. 514.

(s) *Catton v. Wyld*, 32 Beav. 266.

(t) *Re Hooper*, 32 Law J. Rep., N. S., Ch. 55 ; 1 N. R. 115, per Turner, L. J.



the rule for the court itself to hear every cause from the beginning to the end; and in order for the proviso in the 2nd section to apply, the administration of justice in the particular cause must be promoted by an action at law, or a trial in another court (*u*). The court is not bound by this act to enter into the question of the plaintiff's right to damages; but the obvious spirit and intention of the act will incline the court to exercise the jurisdiction in that behalf given it by the 21 & 22 Vict. c. 27. So Turner, L. J., said, "Upon the best consideration which I have been able to give to the Chancery Regulation Act, I am not satisfied that, under the provisions of that act, we are absolutely bound to enter into this part of the case, for I much doubt whether the plaintiff's right to damages ought to be considered as being, within the meaning of the act, a question of law or fact cognizable in a court of common law, on which the plaintiff's title to relief in equity depends; but Sir Hugh Cairns' Act has, I think, given us jurisdiction to entertain this question of damages; and having regard to the spirit and intention of the latter act, (the Chancery Regulation Act,) I think that, having this jurisdiction, we ought under the circumstances of this case to exercise it" (*x*).

And in another case, decided shortly afterwards, the same judge repeated that in his opinion the law stood thus, according to Sir Hugh Cairns' Act the court has power to give damages in a case where the bill was properly filed in that court; but under Mr. Rolt's Act

(*u*) *Young v. Fernie*, 8 N. R. 270; 33 Law J. Rep., N. S., Ch. 192.

(*x*) *Johnson v. Wyatt*, 2 De G. J. & S. 18; 33 Law J. Rep., N. S., 398; 3 N. R. 270.

it was not compulsory for the court to exercise that jurisdiction. Thinking that the present case could be more effectively disposed of by a court of law than in a court of equity, he did not think the court would be well advised in going into the question of damages (y).

In a late case it was urged upon the court that the clause in the 4th section of the act permitting the court to refuse relief if the matter had been improperly brought into equity, referred to cases in which the court had no jurisdiction, not to those in which it might, on the particular merits, think an injunction inexpedient, and that therefore the plaintiffs were entitled to damages, even if an injunction were refused them. But Turner, L. J., said, "As to Mr. Rolt's Act, independently of the doubt which I suggested in *Johnson v. Wyatt*, and which I continue to feel, I am of opinion that there is nothing in that act which renders it necessary for us to give this relief; for I think that the question of damages is within the meaning of the act a question as to which a court of common law has concurrent jurisdiction; and I think that the plaintiffs had not at the time of the filing of this bill any case entitling them to relief in equity, and that the matter therefore has been improperly brought into equity, and ought to have been left to the sole determination of a court of law. It is obvious that if we were to entertain the question of damages when the case in other respects fails in equity, the consequence would be to put an end to all actions in cases

(y) *Swaine v. The Great Northern Railway Company*, 33 Law J. Rep., N. S., Ch. 408; 3 N. R. 400.

of this nature, and bring all such cases under the jurisdiction of this court" (x).

In *Hepburn v. Lordan* (a), Wood, V. C., granted an interlocutory injunction on the plaintiff's undertaking to indict the defendant forthwith for a nuisance at law. The plaintiff's counsel suggested that the court was bound under this act to try the question as to the nuisance itself instead of sending the parties to law; but the Vice-Chancellor declined to accede to that proposition.

Since the 25 & 26 Vict. c. 42, it is customary for the court, when it dismisses a bill thinking that the question of damages can be better disposed of by a court of law, to insert words in the order to the effect that the dismissal is without prejudice to such right as the plaintiff may have to bring an action at law. This is done lest it should be thought that the court has by the dismissal of the bill concluded the question of damages, it having power so to do (b).

(x) *Durell v. Pritchard*, L. R., 1 Ch. 251; 35 Law J. Rep., N. S., Ch. 226.

(a) 5 N. R. 301.

(b) *Swaine v. The Great Northern Railway Company*, 33 Law J. Rep., N. S., Ch. 403; *Robson v. Whittingham*, L. R., 1 Ch. 445; 35 Law J. Rep., N. S., Ch. 228.

## CHAPTER VII.

OF THE EVIDENCE AND MEASUREMENT IN CASES OF  
ALLEGED INJURY TO THE RIGHT TO WINDOW LIGHTS.

It is not proposed to treat in this Chapter of the evidence by which the one party seeks to establish his right to window lights, and the other to prove that that right has never existed, or has become extinct; but simply of the evidence produced in cases where the right to window lights is admitted, and the question is whether that right has or has not suffered injury.

The point which a plaintiff has to prove in cases of this kind is, that his supply of light and air will be so reduced by the operations of the defendant as to render his house uncomfortable for occupation, or less fit for the carrying on there of his accustomed business<sup>(a)</sup>. The evidence brought forward by the plaintiff and defendant respectively to prove and disprove this point, falls into two classes. Firstly, evidence of witnesses as to the actual effect produced by the operations complained of; and, secondly, evidence as to the amount of sky area of which the plaintiff has been or will be deprived by those operations, the court drawing its conclusions as to the effect on the plaintiff's premises of this amount of deprivation.

With respect to the first class of evidence, it is only necessary here to remind the reader that the court will

(a) Ante, p. 75.

pay no regard to the evidence given by other persons engaged in the same business as the plaintiff, that they are able to carry on that business with no greater amount of light than the plaintiff still has left after the operations of the defendant (*b*).

The second class of evidence consists of information as to the height and width of former buildings now removed or proposed to be removed, and their distance from the plaintiff's premises; and of similar information with respect to new buildings erected or proposed to be erected, and of the deductions drawn by scientific men from this information. But the object of all this evidence is simply to obtain an accurate estimate of the amount of sky area which the plaintiff formerly enjoyed, and of which he will be deprived.

This was very clearly brought out by Kindersley, V. C., in a recent case. He said, "The only value, as it appears to me, in all these cases of the question what is the distance of the intended new building from the building in question, or the skylight in question; or what is the height of that new building at that distance; or what is the width of that new building at that distance;—the only value of all these considerations is, that they constitute data from which you are to measure the area of sky which will be shut out by the new buildings. That is the only real value of them; of course it is very necessary to be tolerably accurate for that purpose. But the object is to measure the area of sky which the defendant's buildings will shut out from the plaintiff's ancient windows or ancient lights. And when I say the amount of sky which the de-

fendant's building will shut out, of course it must mean the area of sky which it will shut out more than the old building would shut out; because, of course, the new building is only responsible for the additional area of sky which it shuts out beyond what was shut out by the old building" (c).

In the same case, the Vice-Chancellor made the following valuable observations as to the mode of estimating the sky area:—

"In an ordinary window, that is, a window which is in a vertical frame, and which itself, of course, stands vertically, the quantity of area of sky, supposing there to be no impediment at all, is measured, of course, by 180 degrees horizontally, and 90 degrees vertically, because behind the zenith it can derive no light. If it were a horizontal skylight—a skylight perfectly level with the horizon—it would derive light, that is, light might come to it, from the whole vertical area of 90 degrees on one side, and 90 degrees on the other, making 180 degrees. If it is neither vertical nor horizontal, it will derive light from an area to be measured vertically having regard to the number of degrees that the slope of the building is from the perpendicular, because you must add that slope to the 90 degrees" (d).

The result of these observations seems to be, that, supposing there to be no impediment in any case,—

The sky area of a vertical window is 180 degrees horizontally by 90 degrees vertically.

(c) *Shone v. The City of London Real Property Company (Limited)*, May 8th, 1866. This important case is unfortunately not reported. The author is indebted to the kindness of Mr. H. F. Bristowe for the short-hand notes of the Vice-Chancellor's judgment.

(d) *Ibid.*

That of a horizontal skylight is 180 degrees in every direction.

That of a sloping window or skylight is horizontally 180 degrees in the direction to which it faces, and vertically the same number of degrees as are contained by its own angle with a base line, or, which is equivalent, 90 degrees in addition to the number of degrees by which its slope exceeds a right angle.

A vertical obstruction would be measured by the number of degrees contained by the angle which a line drawn from the window to the top of the obstruction would form with a base line; a horizontal obstruction, by the number of degrees which the lines drawn from the window to the lateral extremities of the obstruction would form with one another. There would be a difference according to the part of the window from which the lines were drawn; it would probably be fairest to take the centre of the window as their starting point in every case.

The production of a model of the premises will, of course, much assist the court; the Vice-Chancellor highly commended one produced to him in this case, so constructed as by a slight change to show either the former or the proposed height, shape, &c., of the defendant's buildings.

The amount of detriment occasioned to the plaintiff is found by simply subtracting the amount of obstruction to his window occasioned by the former building from the amount of obstruction which will be occasioned by the new building. What amount of obstruction the court will consider sufficient to call for its intervention must depend on the circumstances of each particular case. No general rule can be laid down on this head,

but instances have been given in the last chapter of some obstructions which the court did or did not consider to require its interference. It must, however, be remembered that, as *Kindersley, V. C.*, lately said, "We must take into consideration, not how much of the whole sky area the plaintiff has been deprived of, but how much has been taken of that which was left to him by the pre-existing obstruction" (e). And, as in the case before his Honor, an area of sky inconsiderable in itself may be large with reference to the space which was left for the access of light.

*Stuart, V. C.*, in a recent case observed, "It is said that the quantum of injury is to be ascertained by the Metropolitan Building Act (f), which practically establishes, that if a street be forty feet wide, and the buildings on each side forty feet high, any one desirous of raising his walls must increase their distance in the same proportion. In other words, the distance and height must be in the same proportions. That principle seems to me a very good one" (g). The rule suggested by his Honor is plain enough, and the effect would be that no part of the former sky area of the plaintiff's window would be allowed to be obstructed; but the author has not been able to discover the regulation alluded to in the Metropolitan Building Act.

If a jury be summoned to decide the question, they

(e) *Martin v. Headon*, 35 Law J. Rep., N. S., Ch. 605; L. R., 2 Eq. 481.

(f) 18 & 19 Vict. c. 122.

(g) *Lyon v. Dillimore*, 14 W. R. 511. See also *Beadell v. Perry*, 15 W. R. 120. "He (*Stuart, V. C.*) understood that rule to be, that the height to which a person might raise his premises must be in proportion as he receded the erection, *e. g.*, if he raised his wall ten feet he must carry it back ten feet."



ought to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights have undergone (*h*).

This circumstance seems to have induced Wood, V. C., to refuse to summon a jury in a case where the premises no longer existed in their original state. He said, "The benefit of a view, which was also pressed upon me, I think is a good deal exaggerated. If the jury could have had an opportunity of viewing the premises as they existed a year ago, and could be taken to view them as they exist now, the view might be very serviceable. But as it is, I confess I think that by the view the jury is exceedingly likely to be prejudiced; for when a jury view premises as they are, without the slightest knowledge of what they were before, they may be influenced by the remark which was pressed upon me, but which I think is of no value whatever, namely, why there are plenty of people in London who have not so much light as you have" (*i*).

In the case above referred to before Kindersley, V. C., an experiment was tried, while the defendant's intended buildings were still unfinished, as to what would be the diminution of light on the plaintiff's premises when those buildings were completed. Sackcloth was raised on poles to the height of the proposed new building, and then lowered to the level of the old. The defendant's agents, present in the plaintiff's premises at the time of the experiments, deposed that they were unable to tell the moment of the alteration. The Vice-Chancellor said

(*h*) *Back v. Stacey*, 2 C. & P. 466.

(*i*) *Dent v. The Auction Mart Company*, 35 Law J. Rep., N. S., Ch. 566; L. R., 2 Eq. 254.

this would have been a most satisfactory and conclusive experiment, had notice been given of it to the plaintiff, and had it been performed in his presence and that of scientific witnesses on both sides, and suggested its repetition under those conditions; but he said, that performed as it was, and not communicated to the plaintiff, an inference unfavourable to the defendants arose (j).

The 42nd section of the 15 & 16 Vict. c. 80, is as follows:—"It shall be lawful for the said court, or any judge thereof, in such ways as they may think fit, to obtain the assistance of accountants, merchants, engineers, actuaries or other scientific persons, the better to enable such court or judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate of such persons."

In a late case, on a motion by the plaintiffs for an interlocutory injunction, the defendants made a cross motion for the appointment by the court under this section of some proper person to inspect the premises of the plaintiffs and the defendants, and to certify the state thereof, and what, if anything, ought to be done by the defendants in respect of the buildings intended to be erected by them, so as to preserve due access of light and air to the plaintiffs' premises, and otherwise to report upon the same as the court should direct. But Wood, V. C., refused the defendants' motion, saying,

(j) *Shone v. The City of London Real Property Company*, ubi supra. A discussion arose in this case as to what material ought to be used for such an experiment. The Vice-Chancellor observed that it was of as great importance that the material used should represent the colour of the intended building, as that it should be perfectly opaque. Of course one containing both qualities would be the best, as in that case, where the buildings were to be of a light colour, tarpauling covered with sackcloth.

“ I think I ought to arrive at the hearing of the cause before I can appoint any person with such functions as now asked. I do not apprehend that it is the course of the court, on an interlocutory application, to appoint a person with such functions. The meaning of the act of parliament, as I have always read it, is this:—It was well known what difficulty the court was constantly placed in by the unsatisfactory variance that exists between gentlemen of great eminence on both sides upon matter of opinion, according to the bias they acquire from the instructions they receive; and therefore the court was empowered by this act to call in the assistance of some person who would enable it, by his judgment and views (being an impartial person named by the court), to arrive at an impartial conclusion between the conflicting parties. I think, in this case, we are hardly ripe for that yet. It may be very desirable at the hearing of the cause, that the plaintiffs should set forth, not only the amount of damage, but the amount of inconvenience which they conceive the defendants ought not to occasion them; and, on the other hand, the defendants may propose a scheme. I shall want some competent witnesses on one side, and some on the other to determine what is right to be done, and then, if there is any difficulty, will be the proper time to call in the assistance of a proper person to inform the court upon the subject, so as to enable it to decide between these conflicting opinions. At present there is no issue or controversy raised, and, therefore, I cannot send a wild sort of reference to a surveyor, as I should not have the advantage even of knowing whether he had considered all the matters in question, until the witnesses had given their evidence on the one side and

on the other ; but when he has had an opportunity of forming his opinion upon the subject, then the judgment of such a person will be valuable " (k).

His Honor's opinion, therefore, appears to be that the assistance given by this section is to enable the court to decide between the conflicting evidence of witnesses, not to supply the place of such evidence.

The judge ought not to make a personal inspection of the premises, but to decide according to the evidence produced in court. For his inspection may bring him to a conclusion opposite to that which is established by the evidence, and then his order will on the face of it appear to be based on evidence requiring an opposite conclusion from that which is embodied in the order (l).

(k) *Stokes v. The City Offices Company*, 11 Jur., N. S. 560.

(l) *Jackson v. The Duke of Newcastle*, 38 Law J. Rep., N. S., Ch. 701 ; 4 N. R. 449, per Lord Westbury, C.



## APPENDIX.



## I.

*Grant of the Right to Window Lights.*

THIS INDENTURE, made the            day of           , BETWEEN  
 A. B. of           , of the one part, and C. D. of           , of the  
 other part: WITNESSETH, that in consideration of the sum  
 of £            upon the execution of these presents paid by the  
 said C. D. to the said A. B. (the receipt of which sum  
 of £            the said A. B. doth hereby acknowledge, and from  
 the same doth hereby release the said C. D., his heirs, exe-  
 cutors, administrators and assigns), HE the said A. B. doth  
 hereby grant and confirm unto the said C. D., his heirs and  
 assigns, FULL RIGHT to the uninterrupted access and trans-  
 mission of light and air to the            side of the messuage  
 situate on the            side of            Street, in the city of           ;  
 known as No.            in            Street aforesaid, and now in the  
 occupation of           , OVER the land of the said A. B., in the  
 city of            aforesaid, delineated in the [1st] (a) plan an-  
 nexed to these presents, and therein coloured           , To HAVE  
 AND TO HOLD all and singular the said right, easement and  
 premises hereinbefore expressed to be hereby granted, UNTO  
 AND TO THE USE of the said C. D., his heirs and assigns,  
 owners of the said messuage, to the end and intent that the  
 same may become an easement appurtenant to the said mes-  
 suage [under and subject to the provisoes and conditions  
 hereinafter contained](a); AND THE SAID A. B. doth hereby,

(a) The words between brackets are to be inserted if it be intended to  
 introduce a proviso restricting the right granted to the existing windows  
 of the house.

for himself, his heirs, executors and administrators, covenant with the said C. D., his heirs and assigns, owners of the said messuage, that notwithstanding anything by him the said A. B. done or knowingly suffered, he the said A. B. now hath full power to grant and confirm all and singular the premises hereinbefore expressed to be hereby granted to the use of the said C. D., his heirs and assigns; AND THAT he the said A. B. and his heirs, and every person lawfully or equitably claiming through or in trust for him, will at all times, at the cost of the said C. D., his heirs or assigns, execute and do every such lawful assurance and thing for further or more perfectly assuring, granting and confirming the said right and easement hereinbefore expressed to be hereby granted unto and to the use of the said C. D., his heirs and assigns, owners of the said messuage, as by him or them shall be reasonably required; AND THE SAID A. B. doth hereby, for himself, his heirs and assigns, owners of the said land over which the said easement has been hereinbefore expressed to be hereby granted, to the intent that such covenant may be binding on the owner of the said land for the time being, covenant with the said C. D., his heirs and assigns, owners of the said messuage, that he the said A. B., or any person lawfully or equitably claiming through or in trust for him any interest in the said land, will not at any time do or permit to be done upon the said land any act or thing whereby the access of light and air to the said side of the said messuage may in any way be obstructed or diminished (b).

IN WITNESS, &c.

(b) These covenants are framed on the assumption that the vendee has acquired by purchase the land over which the easement is granted.

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## II.

*Proviso restricting the Grant to Windows existing at the Time of the Grant.*

PROVIDED ALWAYS, and it is hereby agreed and declared, that such uninterrupted access of light and air to the said side of the said messuage over the said lands of the said A. B., shall be had and enjoyed only through or by means of such windows as are now existing in the said side of the said messuage, and which are delineated in the second plan hereto annexed, or (in case the said messuage be rebuilt or another messuage be erected in its place) through or by means of windows containing an area of not more than square feet (c), and placed as nearly as possible in the position of the now existing windows; AND THAT if any other or additional window or windows be made or opened, or any existing window or windows be altered or enlarged in the said side of the said messuage, without the consent in writing of the said A. B., his heirs or assigns, owners of the said lands over which the said right or easement has been hereinbefore granted, then and in that case all right to the uninterrupted access of light and air to the said side of the said messuage over the said lands, either under this present indenture or under any privilege or statutory right acquired by lapse of time, shall immediately cease and determine; AND THAT no lapse of time shall operate so as to confer any privilege or statutory right to the uninterrupted access of light and air to the said side of the said messuage over the said lands, through or by means of any other or additional window or windows, or through or by means of any existing window or windows that may be altered or enlarged in the said side of the said messuage.

(c) The area of the existing windows.

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## III.

*Agreement that the access of Light is enjoyed only by Consent, and shall not confer any Right to Window Lights.*

ARTICLES OF AGREEMENT, made and entered into the      day of      , BETWEEN A. B. of      , of the one part, and C. D. of      , of the other part: IT IS HEREBY AGREED, and the said A. B. doth hereby acknowledge, that the access of light and air to the      side of the messuage situate on the side of      Street, in the city of      , known as No.      in      Street aforesaid, and now in the occupation of      , over land the property of the said C. D., is had and enjoyed solely by the consent and sufferance of the said C. D.; AND THAT, when the access and use of light to and for the said messuage over the said land shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall not be deemed absolute and indefeasible; AND THAT no continuance of such access of light and air to the said      side of the said      messuage over the said land shall operate so as to confer any privilege or statutory right thereto.

IN WITNESS, &c.

## IV.

*Licence from the Owner of the dominant to the Owner of the servient Tenement to erect a House, notwithstanding it may infringe his Right to Window Lights.*

KNOW ALL MEN BY THESE PRESENTS, that I, A. B. of      , do hereby give full licence and liberty unto C. D. of      , to erect and build upon the site of his messuage, situate on the      side of      Street, in the city of      , known as No.      Street aforesaid, and now in the occupation of      , a house of the height and dimensions specified and delineated in the plan drawn in the margin of these presents, notwithstanding

that such house may interfere with the light and air, to the uninterrupted transmission of which to the messuage on the side of Street aforesaid, known as No. Street aforesaid, and now in the occupation of , over the site of the said intended house, I, the said A. B., am entitled.

IN WITNESS, &c. (d).

(d) This licence is intended for the common case of the erection of a new and enlarged house on the site of a former house. It will of course be easy to adapt it to slightly different cases, *e.g.*, the enlargement of an existing house, or the erection of a house where none previously stood. This licence operates as evidence of the intention of the owner of the dominant tenement to abandon his right to window lights to the extent to which it will be interfered with by the building for the erection of which licence is given, and need not be by deed (vide page 108). If, however, it be intended to confer a right to window lights on the new building, such a licence will not be sufficient, and there must be a grant under seal. In that case the leave given, to erect the building notwithstanding its interfering with the previous right to window lights enjoyed by the grantor's tenement, will be best introduced in a recital.



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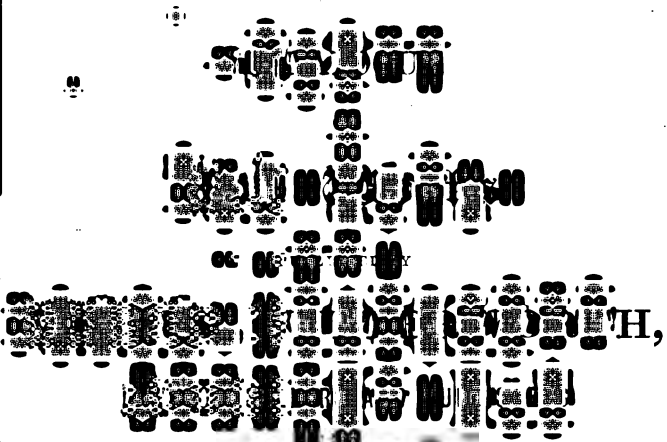
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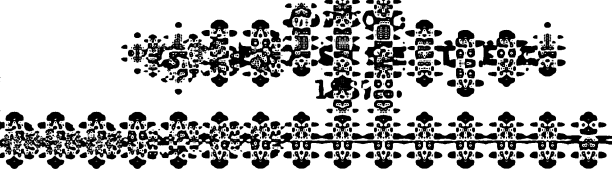
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